[Cite as *State v. Catron*, 2015-Ohio-2697.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101789

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARVIN L. CATRON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

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

BEFORE: Stewart, J., Jones, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: July 2, 2015

ATTORNEY FOR APPELLANT

Edward M. Heindel
450 Standard Building
1370 Ontario Street
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

Kevin R. Filiatraut
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶1} Defendant-appellant Carvin Catron appeals his conviction and sentence for murder and felonious assault. In five assignments of error, Catron argues that he was prejudiced by erroneous jury instructions, his convictions of murder and felonious assault were not supported by sufficient evidence and were against the manifest weight of the evidence, the court erred by failing to merge the offenses, and the trial court erred by admitting prejudicial autopsy photographs. Finding no merit to Catron's arguments, we affirm his convictions.

{¶2} The state presented several witnesses who collectively testified that on the morning of July 28, 2013, Catron and his brother got into an argument over a cigarette lighter. Before long, both men had their guns drawn and began shooting at each other. During the course of the shootout, a next-door neighbor who was standing on his front porch, was shot in the lower abdomen and right hand. Catron was shooting from in front of his driveway next to the victim's home. The brother was shooting from across the street. The victim was later pronounced dead as a result of extensive blood loss from the abdominal wound.

{¶3} Catron was indicted in a five-count indictment. Counts 1 and 3 charged him with murder in violation of R.C. 2903.02(A) and 2903.02(B) respectively, both carrying one- and three-year firearm specifications. Counts 2 and 4 charged felonious assault in violation of R.C. 2903.11(A)(1) and 2903.11(A)(2) respectively, both counts carrying

one- and three-year firearm specifications as well as notice of prior conviction and repeat violent offender specifications. Catron was also charged with having a weapon while under disability in violation of R.C. 2923.13(A)(3), with one- and three-year firearm specifications attached.[1]

{¶4} Following a jury trial, Catron was found guilty of murder in violation of R.C. 2903.02(B), Count 3, and felonious assault in violation of R.C. 2903.11(A)(2), Count 4. He was also found guilty on the one and three-year firearm specifications attached to both of those counts, the notice of prior conviction and repeat violent offender specifications attached to Count 4, having a weapon while under disability, and the one- and three year firearm specifications attached to that count. He was acquitted on the remaining counts.

{¶5} The court sentenced Catron to a prison term of 15 years to life on the murder charge and three years for the firearm specification attached to that count for a total of 18 years to life. The court further sentenced Catron to four years in prison on the felonious assault charge, in addition to three years for the firearm specification attached to that count. Lastly, the court ordered 36 months in prison on the disability charge and three years on the firearm specification attached to that count. The court ordered the three-year firearm specification attached to felonious assault to run consecutive to the 18 to life on the murder charge, and ordered all other counts and specifications concurrent

[1] The indictment also charged the brother with the same offenses. The two were tried jointly.

with the base sentence of 15 to life on the murder conviction. Catron's total sentence is 21 years to life in prison.

{¶6} In his first assignment of error, Catron argues that the court committed prejudicial error by incorrectly instructing the jury that "purpose" and "accident" have the same meaning. Catron argues that his central defense in the case was that the shooting of the victim was a terrible accident and that because the court incorrectly instructed the jury on the definition of "purpose," the trial court's instruction deprived him of a fair trial.

{¶7} First, we note that Catron did not object to the jury instructions. When a defendant fails to object to jury instructions, our review is limited to whether the instructions amounted to plain error. *State v. Steele*, 138 Ohio St.3d 1, 2013-Ohio-2470, 3 N.E.3d 135, ¶ 29; *State v. Mockbee*, 2013-Ohio-5504, 5 N.E.3d 50, ¶ 24 (4th Dist.); Crim.R. 52(B). Appellate courts take notice of plain error "with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 59. Plain error is found when the outcome of the trial would have been different but for the alleged error. *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994).

{¶8} A review of the record establishes that the court did instruct the jury that "'purpose' and 'accident' mean the same thing," in the context of a murder charge. Tr. 1052. This was error. However, it cannot be said that the outcome of Catron's trial would have been different but for the error.

{¶9} Jury instructions are reviewed as a whole to determine whether they contain prejudicial error. *State v. Nordstrom*, 8th Dist. Cuyahoga No. 101656, 2015-Ohio-1453, ¶ 23, citing *State v. Fields*, 13 Ohio App.3d 433, 436, 469 N.E.2d 939 (8th Dist.1984). When looking at the totality of the instructions in this case, we cannot say that the jury would have been mislead by the court's misstatement. The court instructed the jury as follows:

> Purpose is an essential element of the crime of murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendants a specific intention to cause * * * death * * *. And purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. *To do an act purposely is to do it intentionally and not accidentally.*
>
> *"Purpose" and "accident" mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.*
>
> And the purpose with which a person does an act or brings about a result is determined from the manner in which it is done, the means or weapon used, and all other facts and circumstances in evidence.[2]

(Emphasis added.)

{¶10} The instruction preceding the court's error states that "to do an act purposely is to do it intentionally and not accidentally"; the court then states that "purpose" and "accident" mean the same thing. As these two statements are in contradiction, the

---

[2] We recognize that the mistake of saying "accident" instead of "intent" could very well have been made by the court, but likewise, because the words sound similar, the mistake may have been made in the transcription. Of course, there is no way of knowing how the mistake occurred, so we must impute it to the trial court.

obvious and logical explanation is that the court made a mistake and meant to say that "purpose" and "intent" mean the same. This explanation is supported by the hard copy of the jury instructions. Tr. 1033. The hard copy of the instructions correctly states:

> Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

Because the jury had in its possession the correct definitions, we do not find plain error that prejudiced Catron. *Accord Nordstrom* at ¶ 26.

{¶11} Catron further contends that the state failed to present sufficient evidence to support his conviction of felony murder under R.C. 2903.02(B), or, in the alternative, that his conviction was against the manifest weight of the evidence. We disagree on both points.

{¶12} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). On review, appellate courts examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved all of the essential elements of the crime. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386. "In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but

whether, if believed, the evidence against a defendant would support a conviction." *State v. Mosley*, 10th Dist. Franklin No. 14AP-639, 2015-Ohio-1390, ¶ 7.

{¶13} Catron was convicted of felonious assault and felony murder. Felony murder under R.C. 2903.02(B) states:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

Felonious assault was the underlying felony offense of violence in this case. The crime of felonious assault under R.C. 2903.11(A)(2) states that "[n]o person shall knowingly do either of the following * * * cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶14} Thus, in order for there to be sufficient evidence of felony murder, the state had to present evidence that Catron attempted to cause physical harm to his brother by means of a deadly weapon, which proximately caused the death of the victim.

{¶15} Criminal conduct constitutes the "proximate cause" of a death, when the conduct "(1) caused the result, in that but for the conduct, the result would not have occurred, and (2) the result [was] foreseeable." *State v. Gibson*, 8th Dist. Cuyahoga No. 98725, 2013-Ohio-4372, ¶ 36, citing *State v. Muntaser*, 8th Dist. Cuyahoga No. 81915, 2003-Ohio-5809, ¶ 38. "Foreseeability is determined from the perspective of what the defendant knew or should have known, when viewed in light of ordinary experience." *Muntaser* at ¶ 38. Results are foreseeable when the consequences of an action are "natural and logical," meaning "that [they are] within the scope of the risk created by the

defendant." *Id.,* citing *State v. Losey,* 23 Ohio App.3d 93, 491 N.E.2d 379 (10th Dist.1985).

{¶16} At trial, several witnesses testified that Catron drew a gun on his brother and the two began shooting across the street at each other. This evidence is sufficient to support a conviction of felonious assault. Further, the brothers' mother testified that she saw Catron draw his weapon first and fire a shot. Catron also testified that he fired before his brother did. This is enough to show that Catron was the proximate cause of the victim's death, even if the evidence showed that the bullets that struck the victim came from the shots fired from the brother's position across the street. It was reasonable for the jury to conclude that Catron's firing of his weapon created a foreseeable risk that the brother would fire back, and thus cause the death of the innocent third-party victim. Therefore, there was sufficient evidence to support Catron's convictions.

{¶17} Further, we cannot conclude that Catron's convictions are against the manifest weight of the evidence. Unlike a sufficiency challenge, which tests the burden of production of evidence, a manifest weight challenge tests the burden of persuasion. *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541. In a manifest weight challenge, the appellate court sits as a "thirteenth juror" and "review[s] the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses[,] and * * * resolve[s] conflicts in the evidence," to determine whether "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* at 387.

{¶18} This is not a case where it can be said that the jury clearly lost its way in finding Catron guilty of murder and felonious assault. Numerous witnesses testified at trial that they saw and heard the brothers shooting at each other. Further, it was clear that the victim was shot as a result of the brothers' gun battle. Although Catron attempts to argue on appeal that he was acting in self-defense, he did not raise the defense at trial. It is therefore waived.[3] As we find that Catron's convictions are supported by ample evidence, we overrule his sufficiency and manifest weight challenges.

{¶19} Next, Catron argues that the trial court erred by convicting him and sentencing him on felony murder and felonious assault because these offenses are allied offenses of similar import that should have merged under R.C. 2941.25.

{¶20} R.C. 2941.25 provides:

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

{¶21} The effect of R.C. 2941.25 is that courts are to merge offenses when the offenses are closely related and arise out of the same occurrence. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 43. In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct. *Id.* at ¶ 48, citing *Ohio v. Blankenship*, 38 Ohio St.3d 116, 119, 526 N.E.2d 816 (1988).

---

[3] Catron's brother did raise self-defense as an affirmative defense at trial.

"If the offenses correspond to such a degree that the conduct constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Johnson* at ¶ 48.

{¶22} "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, that is 'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, citing *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., concurring). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Johnson* at ¶ 50.

{¶23} However, our court has held that "[s]eparate convictions and sentences are permitted [under R.C. 2941.25] when a defendant's conduct results in multiple victims." *State v. Allen*, 8th Dist. Cuyahoga No. 97014, 2012-Ohio-1831, ¶ 59. Here, the victim of the felonious assault charge is Catron's brother, on whom Catron pulled his weapon and began to shoot. The victim of the murder is the neighbor who was killed as the proximate result of the brothers' mutual felonious assaults. As there are separate victims, the court did not err in declining to merge the offenses. This assignment of error is overruled.

{¶24} In his final assignment of error, Catron argues that the trial court committed reversible error by admitting into evidence ten autopsy photos. Catron claims that these photos were not only gruesome but were cumulative and prejudiced his case.

{¶25} The prosecution is entitled to present evidence showing the cause of death, even if the cause is uncontested, to give the jury an "'appreciation of the nature and circumstances of the crimes.'" *State v. Chatmon*, 8th Dist. Cuyahoga No. 99508, 2013-Ohio-5245, ¶ 41, citing *State v. Evans*, 63 Ohio St.3d 231, 251, 586 N.E.2d 1042 (1992). Nevertheless, the admission of autopsy photographs cannot contravene the rules of evidence. *See id.* Evid.R. 403(A) dictates when a trial court must exclude evidence. It states: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Under Evid.R. 403(B), relevant evidence "may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." The admission or exclusion of such photographic evidence is left to the discretion of the trial court. *State v. Hill*, 12 Ohio St.2d 88, 90, 232 N.E.2d 394 (1967), paragraph two of the syllabus.

{¶26} The brother's defense counsel objected to the introduction of the photographs, but Catron's counsel did not. Therefore, Catron has waived all but plain error on this issue. Crim.R. 52(B).

{¶27} The gruesomeness of photographs from a violent crime can be subjectively debated, but contrary to Catron's contention, we do not find the state's photographs so "gruesome" that they should have been excluded on this basis alone. However, we do find that some of the photographs are cumulative and irrelevant.

{¶28} In addition to there being numerous pictures of the fatal gunshot wound, the state's exhibits Nos. 78, 88, 96, and 97 are irrelevant and have no probative value. These photographs depict the victim's body lying unclothed on an autopsy table. Specifically, state's exhibits Nos. 78 and 88 are close up views of only the victim's face, with exhibit No. 78 showing evidence of the emergency medical treatment performed on the victim, including the presence of a nasal trumpet and endotracheal tube still inserted in the victim's nose and mouth. Although the concurring opinion notes that exhibits Nos. 78 and 88 depict the autopsy protocol of how a body is received when it arrives at the coroner's office and how the body is subsequently "washed," as testified to by Dr. Wiens, no visuals are needed for such testimony. The photographs do not aid the trier of fact in determining whether Catron was responsible for the victim's death.

{¶29} Exhibits Nos. 96 and 97 show full views of the victim's naked body lying on an autopsy table. However, because of the distance needed to capture the image of the body from head to toe, one would need a magnifying glass to see the entrance wound on the victim's abdomen. And because the body is on its back, the exit wound is not visible at all. On the other hand, several of the state's exhibits do adequately show the gunshot wounds. Six of the state's exhibits (Nos. 89, 91, 92, 94, 99, and 100) clearly show the entrance and exit wounds on the victim's body and do so in a dignified manner.

{¶30} The court should not have allowed exhibits Nos. 78, 88, 96, and 97 because these photographs are cumulative, not probative of anything, and afford the victim and his family very little to no dignity. Because these exhibits have no evidentiary value

whatsoever, we can only conclude that they were introduced to evoke sympathy or to inflame the passion of the jury. *Accord Chatmon*, 8th Dist. Cuyahoga No. 99508, 2013-Ohio-5245 at ¶ 42. Despite the court's error in allowing the photographs to be seen and admitted into evidence, we cannot say that the outcome of trial would have been different but for their introduction. The evidence against Catron was overwhelming, with or without the emotions these photos might have induced. Therefore, we find that Catron was not prejudiced by their admission.

{¶31} Judgment affirmed.

It is ordered that appellee recover of 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., P.J., CONCURS;
EILEEN T. GALLAGHER, J., CONCURS (SEE ATTACHED SEPARATE OPINION)

EILEEN T. GALLAGHER, J., CONCURRING:

{¶32} While I concur with the majority's resolution of this case, I write separately only to express my disagreement with the majority's finding that, although harmless, the trial court erred by admitting state's exhibits Nos. 78, 88, 96, and 97 into evidence.

{¶33} In this case, the challenged exhibits were authenticated and introduced during the testimony of forensic pathologist Dr. Andrea Wiens. Dr. Wiens testified that she performed the autopsy on the victim and concluded that his cause of death "was a perforating gunshot wound to the abdomen."

{¶34} During the course of Dr. Wiens's testimony, the state introduced exhibits Nos. 78 and 88, which depict the head and upper part of the chest of the victim on the autopsy table. In one of the photos, the victim had a nasogastric tube and oral endotracheal tube in him; the other picture depicted the same but with the tubes removed. Dr. Wiens explained that exhibit No. 78 reflects the autopsy protocol of the Cuyahoga County Medical Examiner's Office to document the body as it appears when it arrives at the office, including any clothing worn by the patient and "all evidence of medical therapy" viewable on the face and body. Once medical therapy is removed, the patient is "washed and cleaned so that clear images of any injuries can be obtained." This stage of the autopsy protocol is depicted in exhibit No. 88.

{¶35} Subsequently, the state introduced exhibits Nos. 96 and 97, which depicted "an overall view of [the victim] from head to toe." Significantly, exhibit Nos. 96 an 97 accurately portrayed the size and shape of the entry wound near the victim's abdomen.

{¶36} In my view, the challenged exhibits are illustrative of the procedural steps Dr. Wiens took during the autopsy and the circumstances she relied on when formulating her professional assessment in this case. Thus, I believe the photographs were relevant and were not, as articulated by the majority, offered into evidence solely "to evoke sympathy or to inflame the passion of the jury." Moreover, I do not find the photos to be cumulative. Each of the ten autopsy photos introduced at trial reflected separate stages of the autopsy protocol and separate angles of the victim's body and gunshot wound. In my view, each autopsy photo was independently significant to Dr. Weins's assessment and her ultimate conclusion that the victim was not standing behind a door at the time he was shot, an issue of fact that was highly contested at trial. Finally, as referenced by the majority, the challenged photos are "not so gruesome as to trigger a heightened scrutiny under Evid.R. 403." *See State v. McFeeture*, 8th Dist. Cuyahoga No. 100434, 2015-Ohio-1814, ¶ 117.

{¶37} Under the totality of these circumstances, I would not interfere with the trial court's conclusion that the probative value of the photos was not substantially outweighed by the danger of unfair prejudice. (Tr. 865.) Accordingly, I would find the trial court did not abuse its discretion by admitting state's exhibits Nos. 78, 88, 96, and 97 into evidence.