

[Cite as *State v. Holloway*, 2015-Ohio-4578.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101289

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARNELL HOLLOWAY

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-577833-B
Application for Reopening
Motion No. 485611

RELEASE DATE: October 30, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Darnell Holloway has filed a timely application for reopening pursuant to App.R. 26(B). Holloway is attempting to reopen the appellate judgment that was rendered in *State v. Holloway*, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-1015, that affirmed his conviction and sentence for the offenses of aggravated murder, murder, felonious assault, discharge of a firearm on or near prohibited premises, and having weapons while under disability. We decline to reopen Holloway's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Holloway is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*. Herein, Holloway raises seven proposed assignments of error in support of

his App.R. 26(B) application for reopening. We find that Holloway has failed to establish ineffective assistance of appellate counsel through his seven proposed assignments of error.

{¶4} Holloway's first proposed assignment of error is that

Defendant was denied due process of law when the court, at the conclusion of the instructions, gave an aiding and abetting instruction which was flawed and did not contain all of the elements of aiding and abetting.

{¶5} Holloway, through his first proposed assignment of error, argues that the trial court's jury instruction, with regard to aiding and abetting, was defective because the instruction did not specifically refer to the culpable mental state applicable to the underlying offense of aggravated murder.

{¶6} Courts that have addressed this issue have held that a defendant is not prejudiced when a complicity instruction does not refer specifically to the culpable mental state if the instructions for the underlying offense include the requisite mental state. *State v. Wagner*, 8th Dist. Cuyahoga No. 93432, 2010-Ohio-2221; *State v. Axson*, 8th Dist. Cuyahoga No. 81231, 2003-Ohio-2182; *State v. Head*, 11th Dist. Lake No. 2001-L-228, 2005-Ohio-3407, citing *State v. Dykes* Lake No. 92-L-078, 1993 Ohio App. LEXIS 6082 (Dec. 17, 1993). Herein, Holloway was not prejudiced by the court's instruction on aiding and abetting, because the jury was properly instructed as to the culpable mental state necessary for conviction of the underlying offense of aggravated murder.

THE COURT: Count 1. Aggravated murder.

Defendants Jamal Malone and Darnell Holloway are charged in Count 1 of the indictment with aggravated murder in violation of Revised Code Section 2903.01(A).

Before you can find the defendant, Jamal T. Malone and/or defendant Darnell Holloway guilty of aggravated murder, you must find beyond a reasonable doubt that on or about the 2nd day of July 2012 and in Cuyahoga County, Ohio, defendant Jamal T. Malone and/or defendant Darnell Holloway did purposely and with prior calculation and design cause the death of Kishaun Stratford.

Purpose is an element of the crime of aggravated 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 defendant Jamal T. Malone and/or defendant Darnell Holloway a specific intention and with prior calculation and design to cause the death of Kishaun Stratford.

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.

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.

(Tr. 1239-1240).

{¶7} Holloway has failed to establish any prejudice through his first proposed assignment of error.

{¶8} Holloway's second proposed assignment of error is that

The court gave an impermissible instruction concerning a presumption to be drawn from the evidence as to the infliction of a wound.

{¶9} Holloway, through his second proposed assignment of error, argues that the trial court's jury instruction that allowed the jury to infer purpose from the use of a deadly weapon, with regard to the offense of aggravated murder, was defective. The trial court's instruction to the jury provided that

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 the other facts and circumstances in evidence.

If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to cause death may be but is not required to be inferred from the use of the weapon. The inference if made is not conclusive.

Proof of motive is not required. The presence or absence of motive is one of the circumstances bearing upon purpose. Where an act is a crime, a good motive or purpose is not a defense.

Prior calculation and design means that the purpose to cause the death was reached by a definite process of reasoning in advance of the homicide which process of reasoning must have included a mental plan involving studied consideration of the method and the means or the instrument with which to cause the death of another.

To constitute or be prior calculation there must have been sufficient time and opportunity for the planning of an act of homicide and the circumstances surrounding the homicide must show a scheme designed to carry out the calculated design to cause the death. No definite period of time must elapse and no particular amount of consideration must be given but acting on the spur of the moment or after a momentary consideration of the purpose to cause the death is not sufficient.

Cause is an essential element of the offense of aggravated murder. Cause is an act which directly produces the death of another and without which it would not have occurred.

If you find that the state proved beyond a reasonable doubt each and every one of the essential elements of the offense of aggravated murder as charged in Count 1 of the indictment as to defendant Jamal T. Malone and/or defendant Darnell Holloway, your verdict must be guilty according to your findings. You will then indicate your finding on the verdict form.

If you find that the state failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense of aggravated murder as charged in Count 1 of the indictment as to defendant Jamal T. Malone and/or defendant Darnell Holloway, your verdict must be not guilty according to your findings. You will then indicate that on the verdict form.

(Tr. 1240-1242).

{¶10} The Ohio Jury Instruction for purposely and inference provides that

INFERENCE--USE OF DEADLY WEAPON (ADDITIONAL). You may infer a purpose to cause the death of another when the natural or probable consequence of the defendant's act is to produce death in light of all the surrounding circumstances. Such circumstances include the weapon used and its capability to destroy life. If you find that the defendant used a deadly weapon against another in a manner calculated to destroy life, you may, but are not required to, infer the purpose to cause death from the use of the weapon. Whether an inference is made rests entirely with you.

{¶11} The trial court's jury instruction, with regard to purposely and inference, did not prejudice Holloway because it was substantively identical to Ohio Jury Instruction 2-CR 417 OJI 417.01. *State v. Stephenson*, 4th Dist. Adams No. 12CA936, 2013-Ohio-771; *State v. Franklin*, 11th Dist. Geauga No. 2010-G-2979, 2012-Ohio-1267; *State v. Pariscoff*, 10th Dist. Franklin No. 09AP-848, 2010-Ohio-2070. Holloway has failed to establish any prejudice through his second proposed assignment of error.

{¶12} Holloway's third proposed assignment of error is that

Defendant was denied due process of law when the court allowed a conviction to be based on other causes.

{¶13} Holloway has failed to present any argument with regard to his third proposed assignment of error. In *State v. Kelly*, 8th Dist. Cuyahoga No. 74912, 1999 Ohio App. LEXIS (June 21, 2000), this court established that the mere recitation of assignments of error is not sufficient to meet the burden to prove that the applicant's appellate counsel was deficient for failing to raise the issues he now presents or that there was a reasonable probability that the applicant would have been successful if the present

issues had been considered in the original appeal. *See also State v. Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-4467; *State v. Hawkins*, 8th Dist. Cuyahoga No. 90704, 2009-Ohio-2246. The failure of Holloway to present any argument with regard to his third proposed assignment of error results in the failure to demonstrate that his appellate counsel was deficient and that he was prejudiced by the alleged deficiency. *State v. Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-5151.

{¶14} Holloway’s fourth proposed assignment of error is that

Appellant was denied due process of law when the court omitted any culpable mental state on count five.

{¶15} Holloway, through his fourth proposed assignment of error, argues that the trial court’s jury instruction as to Count 5, discharge of a firearm on or near prohibited premises, failed to include any culpable mental state. R.C. 2923.162, discharge of firearm on or near prohibited premises, provides in pertinent part that

(A) *No person shall do any of the following:*

(1) Without permission from the proper officials and subject to division (B)(1) of this section, discharge a firearm upon or over a cemetery or within one hundred yards of a cemetery;

(2) Subject to division (B)(2) of this section, discharge a firearm on a lawn, park, pleasure ground, orchard, or other ground appurtenant to a schoolhouse, church, or inhabited dwelling, the property of another, or a charitable institution;

(3) Discharge a firearm upon or over a public road or highway.

(Emphasis added.)

{¶16} In *State v. Cheraso*, 43 Ohio App.3d 221, 223, 540 N.E.2d 326 (1988), the court found that “ * * * when a statute reads, ‘No person shall * * *,’ absent any reference

to the requisite culpable mental state, the statute is clearly indicative of a legislative intent to impose strict liability.” Because R.C. 2923.162(A)(3) provides that “[n]o person shall * * * [d]ischarge a firearm upon or over a public road or highway,” it is a strict liability offense, which may be proven without regard to a culpable mental state. Therefore, the trial court’s instruction was proper and Holloway has failed to establish any prejudice through his fourth proposed assignment of error.

{¶17} Holloway’s fifth assignment of error is that

Defendant was denied due process of law when the court did not require unanimity in a verdict as to which theory defendant was found guilty.

{¶18} Holloway, through his fifth proposed assignment of error, argues that the trial court erred by failing to instruct the jury that unanimity was required as to any offense of which he was found guilty. In addition, Holloway argues that the trial court failed to instruct the jury on complicity.

{¶19} The Supreme Court of Ohio has established that a trial court does not commit error by failing to specifically instruct the jury that it is required to reach a unanimous verdict as to whether a defendant was the principal offender or an aider and abettor to the offense of aggravated murder, because the defendant could have been convicted as the principal offender or as an aider and abettor.

In proposition of law four, appellant claims that the trial court erred in failing to specifically instruct the jury that it must find by unanimous verdict that appellant was either the principal offender or, if not the principal offender, that appellant was an aider and abettor. We note that appellant failed to object to the instruction and thus has waived all but plain error. Appellant asserts that, pursuant to *State v. Johnson* (1989), 46 Ohio St.3d 96, 104, 545 N.E.2d 636, 644, if a single count of the indictment can be

divided into two or more distinct conceptual groupings, the jury must be specifically instructed that it must unanimously conclude that the defendant committed acts falling within one particular grouping in order to reach a guilty verdict. Our response to appellant's argument is threefold.

First, in *Johnson* we indicated that a specific instruction is necessary when there exists the possibility of a "patchwork" or less than unanimous verdict. *Id.* at 105, 545 N.E.2d, at 645. *Johnson* involved an R.C. 2929.04(A)(7) specification, which requires a finding of either principal offender or prior calculation and design before death can be imposed. In contrast, the specification at issue here, R.C. 2929.04(A)(4), requires only that the murder was perpetrated by appellant while he was a prisoner in a detention facility. R.C. 2929.04(A)(4) makes no distinction between principal offender and aider and abettor.

Second, appellant could be convicted of aggravated murder under R.C. 2903.01(A) as a principal offender, or as an aider and abettor, pursuant to R.C. 2923.03(A). R.C. 2923.03(F) also provides that appellant could be punished as an aider and abettor as if he were the principal offender.

Our third response centers on appellant's additional contention that the failure of a specific instruction deprived him of his right to a reliable sentencing hearing. Appellant contends that such failure prevented defense counsel from asserting, and the jury from considering, the mitigating factor in R.C. 2929.04(B)(6), which permits the jury to consider a defendant's aider and abettor status. However, we find no error, since the evidence was substantial that appellant was a principal offender. There was substantial testimony that the shank in appellant's possession caused two of Watkins's six fatal wounds. We have previously stated that "principal offender" means the "actual" killer and not the "sole" offender. As there can be more than one actual killer, there can thus be more than one principal offender. *State v. Keene* (1998), 81 Ohio St.3d 646, 655, 693 N.E.2d 246, 256. Accordingly, we find that appellant has not met his burden under the plain error standard and we reject his fourth proposition of law.

State v. Stojetz, 84 Ohio St.3d 452, 705 N.E.2d 329 (1999), at 455.

{¶20} Therefore, Holloway has failed to establish any prejudice through his fifth proposed assignment of error.

{¶21} Holloway's sixth proposed assignment of error is that

Defendant was denied due process of law when the court sentenced the defendant for aggravated murder notwithstanding the verdict of the jury finding the defendant guilty of murder, a lesser offense.

{¶22} Holloway, through his sixth proposed assignment of error, argues that the verdicts for both aggravated murder and murder were inconsistent and that he was improperly sentenced with regard to the conviction for aggravated murder. It is well settled that a prosecutor may submit multiple counts stemming from the same offense to the jury and a jury may find a defendant guilty of both counts. *State v. Osborne*, 49 Ohio St.2d 135, 359 N.E.2d 78 (1976). R.C. 2941.25 resolves any prejudice that may occur by limiting conviction to only one count. Conviction is more than merely a finding of guilt; it is a combination of the verdict and the sentence imposed. Holloway was prosecuted and found guilty of two similar offenses but sentenced only as to one offense. *State v. Henderson*, 58 Ohio St.2d 171, 389 N.E.2d 494 (1979). Herein, the trial court imposed sentence only on Count 1, aggravated murder. No prejudice befell Holloway as a result of his conviction for both of the offenses of aggravated murder and murder.

{¶23} Holloway's seventh proposed assignment of error is that

Defendant was denied due process of law when the court did not instruct the jury concerning the firearm specifications that defendant have knowledge as an aider and abettor of the firearm specifications.

{¶24} Holloway, through his seventh proposed assignment of error, argues that the trial court erred by failing to instruct the jury, with regard to the firearm specifications, that a person charged with aiding and abetting concerning a firearm must "instruct the jury that if convicted as an aider and abettor the person must know or have advance

knowledge that the co-defendant or principal offender would have a firearm. *Rosemond v. United States*, 572 U.S.____, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014).”

{¶25} The holding of *Rosemond* is not applicable to the case sub judice. Holloway was charged as the principal offender for all counts and firearm specifications. In fact, this court in our original appellate opinion reviewed the issues of sufficiency of the evidence and manifest weight, as associated with all counts and firearm specifications, and determined that Holloway indeed was the principal actor vis-a-vis possession of a firearm and the shooting of the victim.

Surveillance video from Partner’s Pub, which was played for the jury, depicts Stratford [the victim] riding his bicycle up to a white Chevy Impala, later determined to be Malone’s [codefendant] car. He parked his bicycle and approached the driver, later determined to be Malone. While Stratford spoke with Malone, the video depicts a man, later identified by Prude [witness] as Holloway, walking along the sidewalk. Holloway made an abrupt turn, runs up behind Stratford and fires his gun. Stratford is hit by two bullets, one in the lower back and one in the buttock. Holloway then jumped into the passenger side of the car and Malone drives away from the scene.

* * *

Prude, who is Holloway’s cousin, identified Holloway from the surveillance video as the shooter. Prude wrote Holloway’s name next to the shooter on a still frame of the video. He testified that he knew Holloway “from his body weight.” The two jailhouse informants, Young and Smith, testified to Holloway’s involvement in the murder. While Young and Holloway were cellmates, Holloway told Young that a murder occurred around Denison Avenue, a guy named “Hot Mal” hired someone to shoot the victim, and there was a motive for the murder. Young further testified that Holloway admitted to being the shooter and that Holloway was concerned because there were cameras at the scene. Smith testified that he had a conversation with Holloway concerning a murder. Holloway indicated to Smith that he was present for the murder. Smith further testified that he observed Holloway and Malone speaking with one another when they were in jail.

Sowa, the homicide detective assigned to Stratford's murder, testified Holloway repeatedly denied that he knew Malone. However, when Malone was arrested, he was found with prescription pill bottles in Holloway's name.

Based on the foregoing, when viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt.

* * *

Therefore, we find that the convictions are not against the manifest weight of the evidence. We cannot say that the jury lost its way and created a manifest injustice in convicting Holloway.

State v. Holloway, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-1015, ¶ 6.

{¶26} Holloway has failed to establish any prejudice through his seventh proposed assignment of error.

{¶27} Having reviewed Holloway's seven proposed assignments of error, and finding no prejudice, we decline to grant the App.R. 26(B) application for reopening.

{¶28} Application for reopening is denied.

MARY EILEEN KILBANE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR