

[Cite as *State v. Harris*, 2016-Ohio-3071.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103807

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KERMIT B. HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-97-346368-ZA

BEFORE: E.A. Gallagher, J., Jones, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: May 19, 2016

FOR APPELLANT

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Kermit Harris appeals the denial of his motion for resentencing in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm.

Facts and Procedural Background

{¶2} Harris was convicted on May 6, 1997 of aggravated robbery, receiving stolen property, attempted murder and felonious assault. The relevant procedural history of Harris's convictions and numerous appeals has been set forth by this court in *State v. Harris*, 8th Dist. Cuyahoga No. 96887, 2011-Ohio-6762, and need not be revisited here. For our purposes, we simply note that Harris's convictions were upheld on direct appeal in *State v. Harris*, 8th Dist. Cuyahoga No. 72687, 1998 Ohio App. LEXIS 2788 (June 18, 1998).

{¶3} On March 23, 2015 Harris filed a motion for resentencing arguing that the jury verdict form pertaining to his attempted murder conviction had failed to delineate whether he was convicted of a violation of R.C. 2903.02(A) or (B). Harris argued that pursuant to *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, his verdict form failed to set forth the degree of the offense under R.C. 2903.02 and, therefore, the verdict form must be understood to constitute only a finding of guilt for the least degree of the offense charged. Harris suggested that the least degree of the offense set forth in R.C. 2903.02 is subsection (B), felony murder. Because Harris was

convicted of an attempt offense and the Ohio Supreme Court held in *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016, ¶ 10, that “[a]ttempted felony murder is not a cognizable crime in Ohio,” Harris argued that he was entitled to be resentenced for this offense.

{¶4} The trial court denied Harris’s motion, finding that his argument was barred by res judicata and R.C. 2903.02(A) and (B) did not contain separate degrees of murder.

Law and Analysis

{¶5} In his sole assignment of error Harris argues that the trial court erred in denying his motion for resentencing based on the argument presented above.

{¶6} This court has previously held that where an appellant has failed to raise an argument related to the inadequacy of the jury verdict form on direct appeal, res judicata applies to bar subsequent appeals. *State v. Holmes*, 8th Dist. Cuyahoga No. 100388, 2014-Ohio-3816, ¶ 7.

{¶7} However, even if Harris’s assignment of error was not barred by res judicata we note that his argument contains a fatal flaw: at the time of his offenses on December 30, 1996, R.C. 2903.02 did not contain a felony murder provision in subsection (B). The statute at that time read as follows:

(A) No person shall purposely cause the death of another or the unlawful termination of another’s pregnancy.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

{¶8} Ergo the jury verdict forms simply referenced the statute rather than specifically subsection (A) or (B). This court rejected a nearly identical argument in *State ex rel. Williams v. Sutula*, 8th Dist. Cuyahoga No. 103565, 2016-Ohio-408, and noted that R.C. 2903.02 was amended on June 30, 1998 to its present form that contains the felony murder provision in subsection (B). *Id.* at ¶ 4. Therefore, Harris’s argument regarding the jury forms is without merit.

{¶9} Harris’s assignment of error is overruled.

{¶10} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant 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.

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

EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., and
ANITA LASTER MAYS, J., CONCUR