

[Cite as *State v. Franks*, 2016-Ohio-5241.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103682

STATE OF OHIO

PLAINTIFF-APPELLEE
CROSS-APPELLANT

vs.

JAYLIN P. FRANKS

DEFENDANT-APPELLANT
CROSS-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-595272-B

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

RELEASED AND JOURNALIZED: August 4, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Jaylin Franks appeals his conviction, entered upon a jury's verdict, in which Franks was found guilty of aggravated murder and felony murder, aggravated robbery, kidnapping, felonious assault, discharging a firearm near a prohibited premises — each with an associated firearm specification — and tampering with evidence. After merging the murder and assault-related counts, the trial court sentenced Franks to the indefinite term of 23 years to life in prison. We affirm.

{¶2} Franks's friend, the codefendant Coates, was a known drug dealer. On the evening of the murder, one of Coates's clients, Angel, was in the drug house and had bartered the use of her 2013 Toyota Corolla for a supply of drugs. Franks and Coates were driving the vehicle around and stopped for fuel. Angel had a dedicated significant other, the victim, who had been searching for Angel throughout the day, fearing she was on another bender. The victim spotted Angel's car with two strangers at the gas station. The victim approached Franks and Coates and explained the situation, ultimately offering Franks and Coates money to take him to Angel and pay off her debt. Franks spotted a bundled stash of cash in the victim's possession. The conversation at the gas station was caught on camera.

{¶3} At the gas station, Franks and Coates devised a robbery plan. Franks claims he wanted nothing to do with the robbery, but he admitted to accompanying Coates. After the trio arrived at the drug house, Franks guarded the victim while Coates went

inside.¹ Franks and Coates believed the victim to be armed. The victim believed Coates went inside the drug house to retrieve Angel, instead Coates returned with a semiautomatic, high-powered rifle. Immediately before returning, Coates called Franks and told him to get out of the Corolla in which Franks and the victim were sitting.

{¶4} Either Franks or Coates proceeded to shoot at the victim, who was sitting helpless in the front seat of the car, 19 times. The victim was hit several times, once through the back of his head, causing his immediate death. Franks and Coates immediately fled the scene, leaving the victim with the cash that had been the intended target. The money was found in the victim's right-front pocket. The police found the victim with his left-front pocket turned out as if someone had quickly rifled through it. The video surveillance pictures of Franks and Coates, derived from the gas station cameras, were turned over to news stations in the immediate aftermath of the shooting.

{¶5} The day after the murder, Franks and Coates were overheard talking. Franks admitted to being the shooter and said that he would not let Coates take the blame for the shooting. Franks told Coates he shot the victim because the victim had a gun. The next day, Franks volunteered himself to the police, laying blame on Coates who, in turn, blamed Franks. During his interview, Franks claimed to have discarded the red pants he

¹During the conversation Franks had with Coates the following day, Franks indicated it was his responsibility to watch the victim while Coates went inside because the codefendants believed the victim to be armed. In Franks's statement to police, he indicated that Coates was afraid to rob the victim alone and that Franks was supposed to keep an eye on the victim while Coates went into the house. Thus, the state presented a reasonable inference that Franks was guarding the victim to make sure Coates could rob him.

wore on the evening of the murder, the ones he was seen wearing in the surveillance video from the gas station, because he had spilled some liquor on them and decided to get new ones. Coates's clothing from the night of the shooting was recovered and tested positive for gunshot residue. There is no dispute that Coates entered the drug house to retrieve the murder weapon.

{¶6} Franks timely appealed his conviction and advanced ten assignments of error. Most of the assigned errors will be addressed together where relevant, but none have merit.²

{¶7} In the first three assignments of error, Franks argues that the admission of his video-recorded interview with police officers was erroneous for a variety of reasons, including for failing to redact portions of the police officer's questions that impugned Franks's veracity, and all of which ignore the fact that trial counsel (1) stipulated to the admissibility of the recorded interview, and (2) had redacted at least portions of the video before playing the evidence at trial. In light of the stipulation, the more pertinent question is whether the alleged error in admitting the recorded interview of Franks, plain or otherwise, was invited. It was.

{¶8} The invited error doctrine provides that "a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 471, 1998-Ohio-329, 692 N.E.2d 198.

²We note that the state filed a notice of cross-appeal, but failed to file a brief in support. The cross-appeal is dismissed. App.R. 18(C).

Invited error occurs when defense counsel “was actively responsible for the trial court’s error” or “when a party has asked the court to take some action later claimed to be erroneous.” *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183, 738 N.E.2d 1178, quoting *State v. Kollar*, 93 Ohio St. 89, 91, 112 N.E. 196 (1915). Invited error extends to stipulations. *State v. McClendon*, 10th Dist. Franklin No. 11AP-354, 2011-Ohio-6235, ¶ 37 (defendant stipulated to engaging in a pattern of criminal gang activity as the predicate to the charged offense and therefore cannot challenge the sufficiency of the evidence establishing the pattern of criminal gang activity under the invited error doctrine).

{¶9} In the midst of playing Franks’s recorded statement for the jury, during the investigating police officer’s testimony, the court notified the jury that the parties had stipulated to admitting the video into evidence for the jury’s use during deliberations. Tr. 838:5-16. Further, and based on the trial record, it appears that trial counsel’s decision to introduce the video was strategic. At the end of that officer’s testimony, one of the jurors inquired as to a period of silence noticed in the video. The trial court explained that the parties believed that portion of the video to be irrelevant, and therefore, the parties jointly agreed to mute that portion of the video. Tr. 850:23-851:6. Trial counsel was demonstrably aware of the need to limit the jury’s access to irrelevant portions of the video. It can only be presumed that trial counsel’s decision to allow the jury to consider the remaining portions of the video fell into the defense’s trial strategy.³ As a result,

³Quite possibly, this was an effective trial strategy in light of the fact that Franks was

Franks's first three assignments of error challenging any error with the admissibility of the video-recorded statement in its entirety are, at best, invited error. The parties stipulated to the introduction of the recorded interview into evidence, and Franks cannot now challenge the admissibility of that recording because he invited the alleged error. The first three assigned errors are overruled.

{¶10} In his next two assignments of error,⁴ Franks argues that the state failed to present sufficient evidence of complicity to substantiate the state's theory that he aided and abetted Coates with the shooting. This argument overlooks the fact that the state presented two theories for the jury's consideration: that Franks in fact was the shooter, as established by Franks's after-the-fact admissions of guilt to Coates; or that Coates was the shooter, but Franks was complicit in the plan to rob and murder the victim. On the former theory, Franks's entire sufficiency of the evidence argument is that "there is a total absence of constitutionally sufficient evidence that Franks himself killed the victim."

{¶11} A claim of insufficient evidence raises the question whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In reviewing a sufficiency challenge,

acquitted of the aggravated murder charge based on prior calculation and design.

⁴In the fifth assignment of error, Franks claims his trial counsel was ineffective for failing to "focus the jury on, effectively argue about, and object to misrepresentations by the prosecutor concerning, the state's burden to prove intent to kill as argued in Franks's fourth assignment of error," which addressed the sufficiency of the state's evidence on the mens rea issue. Thus, the fifth assignment of error effectively argues that the trial counsel was ineffective in failing to properly argue the sufficiency of the evidence issue for the jury's consideration. Sufficiency of the evidence is a legal standard of review, well outside the purview of the trier of fact.

“[t]he 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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In order to convict Franks, the state needed to establish that Franks either purposely caused the death of another while committing, or attempting to commit, an aggravated robbery or was complicit with Coates who did the nefarious deed. R.C. 2903.01(B).

{¶12} Without considering the credibility of the state’s witness, any rational trier of fact could have determined that Franks’s willingness to take responsibility and share equal culpability with Coates for the murder was a concession of being the primary offender, the shooter, in the purposeful killing of the victim. Franks attempts to downplay his statement by claiming it to be “little more than street bravado of a 20-year-old kid”; however, whether the admission was meant to boost his street reputation weighs on the credibility of Franks, a factor not considered under the sufficiency of the evidence review. The state, having presented evidence of Franks being the primary offender and sharing equal culpability for the murder, presented sufficient evidence substantiating Franks’s conviction under the theory that Franks was the primary offender.

{¶13} Further, even if the jury believed that Franks was not the shooter, there is sufficient evidence demonstrating that Franks was complicit in the purposeful killing of the victim. In order to be found guilty of complicity to commit an underlying crime, the

defendant must have taken some role in causing the commission of the offense. *State v. Lett*, 160 Ohio App.3d 46, 2005-Ohio-1308, 825 N.E.2d 1158, ¶ 27 (8th Dist.), citing *State v. Sims*, 10 Ohio App.3d 56, 460 N.E.2d 672 (8th Dist.1983). ““The mere presence of an accused at the scene of the crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor.”” *Id.*, quoting *State v. Widner*, 69 Ohio St.2d 267, 269, 431 N.E.2d 1025 (1982). Complicity may be shown by both direct and circumstantial evidence, and “participation may be inferred from presence, companionship, and conduct before and after the offense is committed.” *Id.*, citing *State v. Cartellone*, 3 Ohio App.3d 145, 150, 444 N.E.2d 68 (8th Dist.1981). Evidence that the defendant committed overt acts of assistance, such as driving a getaway car or serving as a lookout, is sufficient. *Id.*, citing *State v. Trocodaro*, 36 Ohio App.2d 1, 301 N.E.2d 898 (10th Dist.1973). In *Lett*, the defendant was aware the codefendant was armed and actively participated in the plan to rob the victim. After the crime, the defendant assisted in dealing with the ill-gotten spoils of the crime. Accordingly, the panel concluded that the defendant was more than just present at the scene of the crime. *But see, e.g., State v. Hall*, 8th Dist. Cuyahoga No. 102789, 2016-Ohio-698, ¶ 10 (mere presence during a drug raid was insufficient to establish the defendant was complicit in trafficking cocaine without evidence of active participation in the crime).

{¶14} “A person acts purposely when it is the person’s specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the

offender's specific intention to engage in conduct of that nature." R.C. 2901.22(A). 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. Robinson*, 161 Ohio St. 213, 118 N.E.2d 517 (1954), paragraph five of the syllabus. In this case, the manner in which the victim was killed, an execution-style murder in which 19 rapid-fire shots were sprayed into the vehicle, is sufficient in and of itself to demonstrate that the defendants purposefully caused the death of the victim. Franks's admission to knowing about the robbery, his belief that the victim possessed a weapon, and Coates's call to Franks immediately before the shots were fired are sufficient to demonstrate that Franks was aware of Coates's intention and actively participated in the killing by arguably guarding the victim while Coates retrieved a weapon. Further, Franks's admission the following day that he would not allow Coates to be criminally responsible for the crime alone in and of itself is sufficient to demonstrate that Franks was aware of Coates's intention to murder the victim before attempting the robbery. We find no error and overrule the fourth and fifth assignments of error challenging the sufficiency of the evidence establishing the aggravated murder either through evidence that Franks was the primary offender or complicit in the criminal act.

{¶15} In the sixth assignment of error, Franks argues that his conviction for felony murder, with the felonious assault as the predicate offense, violates the federal and state constitutions because R.C. 2903.02(B) is unconstitutional, calling on this district to adopt

the so-called independent-felony/merger doctrine. The doctrine recognizes that an offender should be convicted of felony murder only if the collateral, or predicate, felony offense was independent of the lethal act. As Franks concedes, the Ohio appellate courts, including this one, have rejected this attack. *State v. Robinson*, 8th Dist. Cuyahoga No. 99290, 2013-Ohio-4375, ¶ 107, *appeal not allowed*, 138 Ohio St.3d 1449, 2014-Ohio-1182, 5 N.E.3d 667, citing *State v. Mays*, 2d Dist. Montgomery No. 24168, 2012-Ohio-838, ¶ 8; *State v. Pickett*, 1st Dist. Hamilton No. C-000424, 2001-Ohio-4022, *appeal not allowed*, 94 Ohio St.3d 1508, 764 N.E.2d 1037 (2002); *State v. Hayden*, 11th Dist. Lake No. 99-L-037, 2000 Ohio App. LEXIS 3198 (July 14, 2000), *appeal not allowed*, 91 Ohio St.3d 1522, 747 N.E.2d 249 (2001). We need not readdress our rejection of the independent-felony/merger doctrine based solely on Franks’s citations to other jurisdictions choosing to do so — although we acknowledge Franks may be simply preserving error for further review. Franks’ sixth assignment of error is overruled.

{¶16} In the seventh, eighth, and ninth assignments of error, Franks challenges the lack of a jury instruction on the definition of “knowingly” for the felonious assault, incidently impacting the felony murder charge that is predicated on the felonious assault charge, and the lack of the instruction for involuntary manslaughter, which Franks claims is the lesser included offense of the aggravated murder as charged under R.C. 2903.01(B).

On top of both errors, Franks included an ineffective assistance of counsel claim in acknowledgment of the failure to request or object to the lack of the jury instructions. We find no merit to any of those assigned errors because Franks was not prejudiced by

the omitted definition and therefore cannot show plain error with respect to the jury instructions or prejudice for the ineffective assistance of counsel analysis.

{¶17} Generally, “a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged, and, where specific intent or culpability is an essential element of the offense, a trial court’s failure to instruct on that mental element constitutes error.” *State v. Adams*, 62 Ohio St.2d 151, 153, 404 N.E.2d 144 (1980). The failure to instruct on that element, when the instruction was neither requested nor an objection preserved, does not amount to reversible error per se. *Id.* The error, as it must rise to the level of plain error, must prejudice the defendant. *Id.* “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.* at 153, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶18} Although Franks was found guilty of felony murder, with the predicate offense being felonious assault, and the separate count of felonious assault, Franks was not convicted of either. The trial court merged the felony murder and felonious assault counts into the aggravated murder count. For the purposes of R.C. 2941.25, the allied offense statute, a “‘conviction’ consists of a guilty verdict *and* the imposition of a sentence or penalty.” (Emphasis sic.) *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 12, citing *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 135. The counts that merged with the aggravated

murder conviction are not convictions; therefore, we need not individually review the findings of guilt on the separate counts. *See, e.g., State v. Williams*, 4th Dist. Scioto No. 11CA3408, 2012-Ohio-4693, ¶ 54; *State v. McKinney*, 10th Dist. Franklin No. 08AP-23, 2008-Ohio-6522, ¶ 39 (only reviewing the sufficiency of the evidence for the crime for which the sentence was imposed and not the counts merged into that crime). Any error with respect to the felony murder and felonious assault jury instructions would be harmless error at best. Even if we found reversible error, any retrial may well be futile based on double jeopardy principles in light of the fact that the aggravated murder conviction was based on the same conduct and already affirmed. *In re A.G.*, Slip Opinion No. 2016-Ohio-3306, ¶ 11 (R.C. 2941.25 codifies double-jeopardy protection in Ohio). There is no dispute that the jury instructions given for the aggravated murder were complete. We agree it would have been the better practice to define knowingly for the jury on the lesser offenses, but in this case and solely based on the plain error standard of review, there is no manifest miscarriage of justice, in light of the merger, that necessitates a more extensive plain error review.

{¶19} Franks also has not demonstrated that he was entitled to the jury instruction on the lesser included offense of involuntary manslaughter. “Even though involuntary manslaughter is a lesser included offense of murder in the abstract, ‘a charge on the lesser included offense is warranted only if the evidence adduced at trial would support it.’” *State v. Driggins*, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, ¶ 92, quoting *State v. Thomas*, 40 Ohio St.3d 213, 216, 533 N.E.2d 286 (1988). In this case, Franks was

charged with aggravated murder based on the purposeful killing that had occurred during the course of a first-degree, aggravated robbery, which is an offense of violence. R.C. 2901.01(A)(9). When the predicate offense underlying the aggravated murder is an offense of violence of the first or second degree, the proper lesser included offense is felony murder under R.C. 2903.02(B), which provides that “[n]o 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.” *State v. Brodie*, 165 Ohio App.3d 668, 2006-Ohio-982, 847 N.E.2d 1268, ¶ 26 (2d Dist.).

{¶20} Involuntary manslaughter under R.C. 2903.04(A), defined as “no person shall cause the death of another * * * as a proximate result of the offender’s committing or attempting to commit a felony,” is almost identically worded but expands the definition to include any felony offense instead of limiting the predicate crime to a first- or second-degree felony offense of violence. *Id.* Thus, felony murder under R.C. 2903.02(B) is the more specific lesser included offense to aggravated murder under R.C. 2903.01(B). *State v. Duncan*, 8th Dist. Cuyahoga No. 87220, 2006-Ohio-5009, ¶ 5 (the involuntary manslaughter lesser included instruction is only warranted in situations where the felony murder cannot be proven based on the lack of evidence establishing that the underlying criminal act was a first- or second-degree offense of violence). If the state proves that Franks committed or attempted to commit aggravated robbery, but failed to convince the jury that Franks purposefully killed the victim, the lesser included offense

available for the jury at that point, based on the lesser mens rea, would be felony murder, which reduces the requisite mens rea from purposefully causing the death to just causing the death. *Id.* (no matter which version of facts the jury believed, the defendant still committed a first- or second-degree offense of violence, and therefore the trial court's refusal to give the involuntary manslaughter lesser included instruction was not error). The facts from this case, if anything, only supported the jury instruction on the lesser included offense of felony murder under R.C. 2903.02(B), and not involuntary manslaughter under R.C. 2903.04.⁵

{¶21} Franks has not demonstrated that the predicate offense for the aggravated murder was anything but a first- or second-degree offense of violence, and therefore, Franks was not entitled to the jury instruction on involuntary manslaughter in this case. *See, e.g., Duncan; State v. Brown*, 9th Dist. Summit No. 20662, 2002-Ohio-148 (overruling defendant's argument — that the evidence demonstrated that the predicate offense for the felony murder was aggravated assault, a fourth-degree felony, and not felonious assault, a first-degree offense of violence, warranting the involuntary manslaughter lesser included instruction).

{¶22} Further solidifying our conclusion, the trial court instructed the jury on murder under R.C. 2903.02(A), the other lesser included offense to aggravated murder, which precludes a person from purposely causing the death of another regardless of

⁵Simple robbery, a second-degree felony under R.C. 2911.02, like aggravated robbery is an offense of violence. R.C. 2901.01(A)(9).

whether it was committed in the course of the aggravated robbery. The jury still found Franks guilty of aggravated murder despite the lesser included instruction. For appellate purposes, to review the jury's conclusion that the facts supported the aggravated murder instead of the straight murder elements requires a manifest weight of the evidence review, which was not invoked by Franks. It is also noteworthy that Franks was charged and found guilty of felony murder with the predicate offense being a first- or second-degree offense of violence, so any error in not instructing the jury on felony murder under R.C. 2903.02(B), as the lesser included offense to the aggravated murder, would be harmless error. Franks's seventh, eighth, and ninth assignments of error must be overruled.

{¶23} In his tenth assignment of error, Franks claims his conviction is against the manifest weight of the evidence. We decline to address the final assigned error as presented. App.R. 16(A)(7). The entirety of the argument set forth in the final assignment of error, occurring on the 40th page of the appellate brief after a two-sentence recitation of the standard of review is as follows: "For all of the reasons addressed throughout this brief and incorporated here, the jury lost its way and its verdict reflects an unreasonable view of the evidence. Frank's convictions are against the manifest weight of the evidence." We will not undertake a thorough review of the evidence of our own accord, especially in consideration that the first nine assigned errors focused on legal or ineffective assistance of counsel issues unrelated to the weight of the evidence. *Kulikowski v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. Cuyahoga Nos. 80102 and 80103,

2002-Ohio-5460, ¶ 56 (parties are precluded from incorporating arguments by reference to circumvent the 40-page brief requirement).

{¶24} 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. *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.* Upon our review of the final assignment of error as presented, we decline the request to undertake our own independent review of the evidence to determine whether this is that exceptional case. The final assignment of error is overruled.

{¶25} The conviction is affirmed.

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