

[Cite as *State v. Lee*, 2016-Ohio-8324.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103988

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAMEL J. LEE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART AND MODIFIED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-595400-C

BEFORE: E.T. Gallagher, J., Jones, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 22, 2016

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Ramel J. Lee (“Lee”), appeals his convictions and sentence. He raises the following seven assignments of error:

1. The trial court erred when it failed to merge specifications under R.C. 2945.145 and 2945.146.
2. The trial court erred in allowing highly prejudicial and irrelevant evidence relating to the death of Arturio Young to be admitted. Therefore, defendant-appellant’s convictions must be reversed.
3. The trial court erred in failing to amend defendant-appellant’s conviction on Count 7 to a misdemeanor conviction.
4. The trial court erred in convicting defendant-appellant when there was prosecutorial misconduct.
5. The trial court erred in imposing consecutive sentences. Therefore, defendant-appellant must be resentenced.
6. The trial court erred by convicting appellant on Counts 5 and 6 when they were not supported by sufficient evidence. Therefore, the convictions must be reversed.
7. The trial court erred when it did not merge Counts 4, 5, and 6.

{¶2} We find some merit to the appeal, affirm the trial court’s judgment in part, and modify it in part.

I. Facts and Procedural History

{¶3} Lee was charged with three counts of attempted murder, in violation of R.C. 2923.02; three counts of felonious assault, in violation of R.C. 2903.11(A)(2); and one

count of discharging a firearm on or near a prohibited premises, in violation of R.C. 2923.162. Counts 1 through 6 included criminal gang activity specifications, in violation of R.C. 2941.142(A), and all counts included firearm specifications, in violation of R.C. 2941.141, 2941.145, and 2941.146. Lee waived his right to a jury with respect to the gang activity specifications, and the remaining charges were tried to a jury.

{¶4} Officer Kenneth Falzini (“Falzini”), of the Garfield Heights Police Department testified that, on February 12, 2014, he responded to a 911 call regarding a drive-by shooting on I-480. The victims reported they had been chased by individuals in a black car, who fired several gunshots into their car. According to Falzini, there was a bullet hole in the front windshield, the passenger front window was “shot out,” and there were multiple bullet[s] holes in the front and rear passenger doors. Despite the number of bullet holes, none of the passengers were physically injured.

{¶5} One of the victims, Dyshenia Crenshaw (“Crenshaw”), testified that Arturo Young (“Young”) used to be affiliated with a gang known as the ATM Jackboyz, but tried to disassociate from the gang after he and Crenshaw had a child together.

{¶6} On the day of the shooting, Crenshaw and Young purchased a 1996 Toyota Camry. Later that day, they picked up their friend, Joseph Willis (“Willis”), and stopped at Speedy’s Market to get gas. Speedy’s Market was located at the intersection of East 131st Street and Harvard Avenue in Cleveland.

{¶7} As Young entered the gas station to pay for gas, he passed Malcolm Edwards (“Edwards”), who was associated with J-Park, another neighborhood gang. While

waiting for Young, Crenshaw observed Edwards speaking with individuals in a black four-door sedan. Young returned to the car and began pumping gas when Lee exited the black car and began walking toward him. Young noticed Lee approaching and quickly attempted to place the nozzle in the pump, but dropped it. In haste, Young left the nozzle on the ground, entered the Camry, and fled the gas station. The black car, occupied by Edwards, Lee, and two other individuals, followed close behind the Camry.

{¶8} Edwards's cousin, Daryl Jones ("Jones"), drove the black car during the chase. Jones testified that Lee threatened to "hurt" him if he failed to pursue the Camry. (Tr. 324-325.) After tailing the Camry for ten minutes on city streets, the Camry turned from Turney Road onto I-480 in Garfield Heights.

{¶9} Young swerved the Camry to the far left lane in an attempt to escape the black car. Crenshaw testified that the black car approached from the right. As it pulled alongside the Camry, the rear driver's side window opened and the passenger, later identified as Lee, began shooting at the Camry. Demetrius Keith ("Keith"), who was seated next to Lee in the back seat, also fired shots at the Camry. Jones testified that he was distressed by the sound of gunshots in the back seat, so he hastened past the Camry, and exited the highway. When the shooting stopped, Crenshaw called 911.

{¶10} Detective Carl Biegacki ("Biegacki"), of the Garfield Heights Police Department, investigated the incident. He reviewed the police report and witness statements, and testified there was a delay in seeking an indictment because the victims were "uncooperative." After much persistence, Biegacki eventually made contact with

Crenshaw, who provided critical information. Biegacki was never able to locate Willis, and Young was murdered six months after the incident. Neither of these victims were available for trial.

{¶11} The jury found Lee guilty on Count 1, the attempted murder charge related to Young, but not guilty of Counts 2 and 3, the attempted murder charges related to Crenshaw and Willis. The jury also found Lee guilty of three counts of felonious assault, one count of discharging a firearm on or near a prohibited place, and all the attendant gun specifications. Following the guilty verdicts, Lee pleaded guilty to the gang specifications.

{¶12} At sentencing, the court merged the attempted murder conviction in Count 1 with the felonious assault conviction in Count 4 because they involved the same victim, namely Young. The court sentenced Lee to 11 years on Count 1, but ordered the three-year firearm specification, the five-year “drive-by” specification, and the one-year gang specification to be served consecutively. The court ordered the one-year firearm specification on Count 1 to be served concurrently with the other specifications on that count.

{¶13} The court ordered Lee to serve eight years on each of the felonious assault convictions alleged in Counts 5 and 6, and 36 months on the discharging a firearm on or near a prohibited place alleged in Count 7, to be served concurrently with the 11-year sentence on the attempted murder conviction. However, the court ordered Lee to serve the three-year firearm specification on Count 5 consecutive to the specifications on Count

1, for a total of 12 years in prison on all the specifications. Combined with the 11-year sentence on the attempted murder conviction, the court ordered Lee to serve an aggregate 23-year prison term. Lee now appeals his convictions and sentence.

II. Law and Analysis

A. Merger of “Drive-By” Specifications

{¶14} In the first assignment of error, Lee argues the trial court should have merged the drive-by specifications with the one- and three-year gun specifications. Lee concedes that under this court’s precedent the trial court was authorized to run the specifications consecutively, but urges us to reconsider our precedent and adopt the dissent’s position in *State v. Coffman*, 10th Dist. Franklin No. 09AP-727, 2010-Ohio-1995, on this issue.

{¶15} The dissent in *Coffman* argued that the drive-by specification set forth in R.C. 2941.146(A) is no different from other gun specifications that subject the defendant to a single penalty enhancement. Indeed, R.C. 2929.14(B)(1)(b), which governs prison terms for gun specifications, provides, in relevant part:

If a court imposes a prison term on an offender under division (B)(1)(a) of this section [providing sentences for firearm specifications], * * * [e]xcept as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.

{¶16} However, as noted within that provision, R.C. 2929.14(B)(1)(g) provides an exception:

If an offender is convicted of * * * two or more felonies, if one or more of those felonies [is] * * * attempted murder * * * and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted * * * and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

{¶17} This court has held that under R.C. 2929.14(B)(1)(g), the trial court must impose prison terms on the two most serious specifications and may, in its discretion, impose a sentence on any other specification, if the defendant is found guilty of two or more specified felonies, including attempted murder, and the felony counts included firearm specifications. *State v. James*, 8th Dist. Cuyahoga No. 102604, 2015-Ohio-4987, ¶ 41. The statute specifically states that “the sentencing court *shall* impose” prison terms “for each of the two most serious specifications of which the offender is convicted.” (Emphasis added.) R.C. 2929.14(B)(1)(g).

{¶18} The statutory language is clear and unambiguous. We therefore decline to adopt the dissent’s position in *Coffman*, 10th Dist. Franklin No.09AP-727, 2010-Ohio-1995. Because Lee was convicted of multiple felonies, including attempted murder, the trial court was required to impose prison sentences on the two most serious

firearm specifications and had discretion to impose a prison term on any or all of the remaining firearm specifications. Therefore, the trial court committed no error in declining to merge the drive-by specification with the one- and three-year firearm specifications in Count 1.

{¶19} The first assignment of error is overruled.

B. Prejudicial Evidence of Murder

{¶20} In the second assignment of error, Lee argues the trial court violated his right to a fair trial by allowing the jury to hear evidence relating to Young's murder. He contends evidence regarding the circumstances of Young's death was unfairly prejudicial.

{¶21} Evid.R. 403(A) provides: "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."

{¶22} "[T]he admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 62.

{¶23} Young was murdered subsequent to the shooting incident in this case. During opening statements, the prosecutor informed the jury that Young was murdered by Keith, one of Lee's codefendants. The state offered the information to explain why Young was not going to testify at trial. However, during the trial, the jury also learned

that Keith and Lee were members of the same gang and that Young was a member of a rival gang. Moreover, Lee was on trial for attempting to murder Young.

{¶24} The fact that Young was later murdered by one of Lee's codefendants is highly prejudicial even if the jury was instructed that Keith, as opposed to Lee, ultimately committed the murder. This prejudice could have been avoided if the jury were simply instructed that Young was deceased. The jury did not need to know the circumstances of his death.

{¶25} Nevertheless, the admission of evidence regarding Young's death was harmless. Lee admitted to police that he and his codefendants chased Young's Camry and that he fired his gun at Young. Edwards and Jones specifically identified Lee as the shooter, and Crenshaw testified that the shooter was seated in the back seat on the passenger's side of the black car, where Lee was sitting. Further, Falzini testified there was a bullet hole in the windshield and that the passenger side of the Camry sustained numerous bullet holes. Thus, there was substantial evidence that Lee attempted to murder and seriously injure Young and that Lee attempted to cause serious physical harm to at least one passenger. Under these circumstances, the jury would have found Lee guilty of the charges in the indictment even if it had no knowledge regarding Young's murder.

{¶26} We, therefore, overrule the second assignment of error.

C. Verdict Forms

{¶27} In the third assignment of error, Lee argues the trial court erred in failing to amend his discharging of a firearm on or near prohibited premises conviction from a third-degree felony to a misdemeanor in order to conform to the jury’s verdict.

{¶28} Lee was charged with discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3), which provides that “no person shall discharge a firearm upon or over a public road or highway.” Count 7 alleged that Lee discharged a firearm upon or over a public road or highway and that “the violation created a substantial risk of physical harm to any person or caused serious physical harm to property.” This language elevated the offense from a misdemeanor to a third-degree felony pursuant to R.C. 2923.162(C)(2).

{¶29} Although the court instructed the jury on the offense enhancing language, the verdict form on which the jury found Lee guilty did not include this aggravating element. Therefore, based on the verdict form, the jury found Lee guilty of the misdemeanor version of the offense.

{¶30} The state concedes the verdict form omitted the offense enhancing language, but “implores” us to presume the jury would have found Lee guilty of the elevated offense because it was instructed on the aggravated elements. We disagree.

{¶31} R.C. 2945.75 provides:

When the presence of one or more additional elements makes an offense one of more serious degree * * * [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶32} The Ohio Supreme Court has held that because this statutory language is plain and unambiguous, it must be applied as written. *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, ¶ 11. Moreover, the *Pelfrey* court noted that the statutory requirement imposes no unreasonable burden on lawyers or trial judges. *Id.* at ¶ 12. “R.C. 2945.75(A) plainly requires that in order to find a defendant guilty of ‘an offense * * * of more serious degree,’ the guilty verdict must either state ‘the degree of the offense of which the offender is found guilty’ or state that ‘additional element or elements are present.’” *Id.*

{¶33} We may not presume that the jury would have found Lee guilty of the aggravating elements. Common sense dictates that we should not make assumptions, and the statute clearly forbids it.

{¶34} Therefore, the third assignment of error is sustained.

D. Prosecutorial Misconduct

{¶35} In the fourth assignment of error, Lee argues “the trial court erred in convicting him where there was prosecutorial misconduct.” He contends his right to a fair trial was violated when the prosecutor made improper comments during closing argument.

{¶36} The test for prosecutorial misconduct in closing argument is “‘whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.’” *State v. Hessler*, 90 Ohio St.3d 108, 125, 734 N.E.2d 1237 (2000), quoting *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). The touchstone of

the analysis is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶37} Lee complains that during the rebuttal portion of closing argument, the prosecutor referred to him as a “psychopath.” Undoubtedly, the comment was intended to denigrate the defendant and was “patently improper.” *State v. Burrell*, 1st Dist. Hamilton No. C-030803, 2005-Ohio-34, ¶ 25 (Prosecutor’s calling the defendant a “‘psychopath’ * * * went beyond zealous advocacy into the realm of the patently improper.”).

{¶38} Nevertheless, given the overwhelming evidence of Lee’s guilt, we cannot say that the prosecutor’s inappropriate comment prejudiced the outcome of the trial. The prosecutor’s misconduct did not deprive Lee of a fair trial.

{¶39} Accordingly, the fourth assignment of error is overruled.

E. Consecutive Sentences

{¶40} In the fifth assignment of error, Lee argues the trial court erred by running the one-year sentence on the gang specification consecutive to the firearm specifications in Count 1. Although R.C. 2929.14(G) mandates an “additional” prison term for anyone who is convicted of a gang specification, Lee contends the phrase “an ‘additional’ prison term” does not mean a “consecutive prison term.”

{¶41} R.C. 2929.14(G) states:

If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 of the Revised Code that charges the offender with having committed the felony while participating in a criminal

gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

{¶42} This court recently held that the plain meaning of the term “additional” in R.C. 2929.14(G) “requir[es] a prison sentence in addition to whatever sentence is being imposed on the predicate offense, whether it be prison or community control.” *State v. Hamm*, 8th Dist Cuyahoga No. 103230, 2016-Ohio-2938, ¶ 12. If the legislature wanted to give the court the option of running the sentence on the gang specification concurrent with other prison terms, it could have made the additional prison term optional. By employing the term “additional,” it is clear the legislature intended that courts should add another prison term onto whatever the prison term was imposed for the predicate offense.

{¶43} Furthermore, the gang specification is a separate sentencing provision from gun specifications. The court was under no obligation to run the prison term on the gang specification concurrently with the prison terms imposed on the gun specifications. Therefore, the trial court properly ran the prison term on Lee’s gang specification consecutive to his other prison terms.

{¶44} The fifth assignment of error is overruled.

F. Sufficiency of the Evidence

{¶45} In the sixth assignment of error, Lee argues the trial court erred in denying his Crim.R. 29 motion for acquittal on Counts 5 and 6. These counts alleged felonious assault against Crenshaw and Willis.

{¶46} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Sufficiency

is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶47} R.C. 2903.11(A)(2) proscribes felonious assault and states in relevant part that “[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.”

{¶48} Lee contends that because there was no evidence he knew that Crenshaw and Willis were in the Camry, there is no evidence that he intended to cause them serious physical harm. Therefore, he argues, his convictions on Counts 5 and 6 should be vacated.

{¶49} However, the evidence in the record demonstrates that Lee and his companions were aware that there were two passengers in Young’s car. In a surveillance video from the gas station, which was entered into evidence, the jury could see the occupants of Young’s car. The gas station was well-lit, and Young’s car did not have tinted windows. Willis was seated in the back seat of the Camry and is clearly visible in the video. Lee and his companions, who were standing under the lights of the gas station near Young’s car, would have undoubtedly seen both Crenshaw and Willis. Indeed, Edwards admitted that he observed Crenshaw in the car during the chase. Viewing this evidence in a light most favorable to the state, we can only conclude there was sufficient evidence that Lee knew there were three occupants in Young’s car.

{¶50} Accordingly, the sixth assignment of error is overruled.

G. Allied Offenses

{¶51} In the seventh assignment of error, Lee argues all the felonious assault convictions should have merged as allied offenses.

{¶52} Lee relies on *State v. Cartellone*, 3 Ohio App.3d 145, 444 N.E.2d 68 (8th Dist.1981), to support his argument. In that case, Cartellone and a codefendant fired three gunshots in quick succession from a moving vehicle and were convicted of three counts of felonious assault. On appeal, this court merged the three felonious assault convictions pursuant to R.C. 2941.25(A), and held that

(1) there was no animus against the innocent bystanders; (2) there was no evidence that the defendant knew of the presence of the innocent bystanders; and (3) the natural and probable consequences of defendant's act produced no consequence such as an injury to these bystanders.

Id. at paragraph one of the syllabus.

{¶53} Undoubtedly, the facts of *Cartellone* are similar to those of the instant case. However, the law regarding the merger of allied offenses has greatly evolved since 1981. We are now bound to following the analysis set forth in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892.

{¶54} In *Ruff*, the court explained that an allied offenses analysis is not limited to consideration of the defendant's conduct. Rather, the court held that while an allied offenses analysis begins with an examination of the defendant's conduct, courts must also consider whether (1) the offenses are dissimilar in import or significance, (2) the offenses

were committed separately, or (3) the offenses were committed with separate animus or motivation. *Id.* at syllabus.

{¶55} With respect to the first factor, the court explained that two or more offenses are dissimilar 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.” *Id.* at syllabus. Two or more offenses of dissimilar import are not subject to merger because the harm to each victim is “separate and distinct.” *Id.* at ¶ 26.

{¶56} As previously stated, there was sufficient evidence to support all of Lee’s felonious assault convictions. Young, Willis, and Crenshaw were each victims of Lee’s shooting. Therefore, since the harm is separate and distinct as to each victim, the felonious assault convictions are not subject to merger.

{¶57} Accordingly, the seventh assignment of error is overruled.

{¶58} Judgment affirmed in part and modified in part. Lee’s discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3) is reduced to a first-degree misdemeanor in order to conform to the jury’s verdict. The remaining convictions and sentences are affirmed.

It is ordered that appellee and appellant share 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.

EILEEN T. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS WITH SEPARATE OPINION

MARY EILEEN KILBANE, J., DISSENTING:

{¶59} I respectfully dissent. I would reverse the trial court's judgment and remand the matter for a new trial.

{¶60} In the instant case, the prosecutor informed the jury during the beginning of his opening statement that Young was murdered by Keith (Lee's codefendant). The prosecutor offered this information to explain why Young was not going to testify at trial.

During the trial, the jury learned that Keith and Lee were members of the same gang, and that Young was a member of a rival gang to Lee and Keith. Then, during closing arguments, the prosecutor referred to Lee as a "psychopath" for shooting at Young as a favor to Edwards.

{¶61} The majority finds that the admission of evidence regarding Young's murder was highly prejudicial, and the prosecutor's comment referring to Lee as a "psychopath" was "patently improper." The majority then concludes that the evidence was harmless and Lee was not deprived of a fair trial.

{¶62} I agree that this evidence was highly prejudicial and the prosecutor's comment was improper. However, I would conclude that the evidence regarding Young's murder, in conjunction with the prosecutor's statement referring to Lee as a "psychopath," prejudicially effected the outcome of the trial.

{¶63} There was no probative value to the evidence regarding Young's murder because it was not related to the facts of the instant case. At the beginning of opening statements, the prosecutor offered highly prejudicial information that Young was murdered by Lee's codefendant and fellow gang member. The evidence of Young's murder, which occurred six months after the incident, ties Lee to Young's death, even though there was no evidence that Lee was involved in the murder. This tainted Lee's trial unfairly, and any prejudice could have been avoided if, instead, the jury was instructed that Young was deceased. Moreover, when the trial court overruled Lee's objection to the prosecutor's comment referring to Lee as a "psychopath," it gave the prosecutor's comment the court's approval in the jury's eyes. *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993). The combination of both contributed to the unfairness of Lee's trial.

{¶64} We cannot know what the verdict might have been had not the jury's vision been clouded with this highly prejudicial evidence of Young's murder and the prosecutor's improper comment. *Id.* at 411, citing *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

{¶65} Accordingly, I would reverse the trial court judgment and remand the matter for a new trial.