[Cite as *State v. Eddy*, 2017-Ohio-7398.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104417

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRELL S. EDDY

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-16-602449-A
Application for Reopening
Motion No. 506663

RELEASE DATE: August 30, 2017

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MARY J. BOYLE, J.:

{¶1} Terrell S. Eddy has filed a timely application for reopening pursuant to App.R. 26(B). Eddy is attempting to reopen the appellate judgment, rendered in *State v. Eddy*, 8th Dist. Cuyahoga No. 104417, 2017-Ohio-741, that affirmed his convictions for the offenses of felonious assault in violation of R.C. 2903.11(A)(2); discharge of a firearm on or near prohibited places in violation of R.C. 2923.162(A)(3); trafficking (between five and ten grams of cocaine) in violation of R.C. 2925.03(A)(2); trafficking (less than 200 grams of marijuana) in violation of R.C. 2925.03(A)(2); drug possession (between five and ten grams of cocaine) in violation of R.C. 2925.11(A); minor drug possession (less than 100 grams of marijuana); and possessing criminal tools in violation of R.C. 2923.24(A). The convictions carried several specifications attached to them, including one-year and three-year firearm specifications, and various forfeiture of property specifications (weapons and drug-related items). We decline to reopen Eddy's original appeal.

STANDARD OF REVIEW

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Eddy 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*.

FIRST PROPOSED ASSIGNMENT OF ERROR

{¶4} Eddy has raised ten proposed assignments of error in support of his application for reopening. Eddy's initial proposed assignment of error is that:

> Defendant was denied due process of law when the court improperly instructed the jury concerning flight.

{¶5} Eddy argues that the jury instruction, with regard to flight, was defective because the trial court failed to state that the flight had to be "immediately" after the offense.

{¶6} The trial court instructed the jury on flight and stated that:

> There may be evidence in this case to indicate that the defendant fled from the scene of the crime. Flight does not in and of itself raise the presumption of guilt, but it may show a consciousness of guilt or guilty connection with the crime.

> If you find that the defendant did flee from the scene of the crime, you may consider this circumstance in your consideration of the guilt or innocence of the offender.

{¶7} An appellant may not assign as error the giving of a jury instruction unless an objection is made before the jury retires and further objects by specifically stating on the record the matter objected to and the grounds for the objection. Crim.R. 30(A). Herein, Eddy failed to object at trial to the trial court's jury instruction as to flight and, therefore, has waived all but plain error on appeal. *State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990); *State v. Burns*, 8th Dist. Cuyahoga No. 95465, 2011-Ohio-4230; Crim.R. 52(B).

{¶8} An improper or erroneous jury instruction does not constitute plain error under Crim.R. 52(B) unless, but for the error, the outcome of the trial would clearly have been different. *State v. Cooperrider*, 4 Ohio St.3d 226, 448 N.E.2d 452 (1983). Assuming that the trial court's jury instruction constituted error, we cannot find that Eddy has demonstrated prejudice such that a manifest miscarriage of justice has occurred. The jury instruction provided by the trial court allowed the jury to reach its own conclusions on the issue of flight and thus consider Eddy's motivation for leaving the scene of the charged criminal offenses. Under such circumstances, this court has declined to find plain error. *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583.

{¶9} It must also be noted that the decision to give a jury instruction rests within the sound discretion of the trial court. *State v. Howard*, 8th Dist. Cuyahoga No. 100094,

2014-Ohio-2176, citing *State v. Martens*, 90 Ohio App.3d 338, 629 N.E.2d 462 (3d Dist.1993). We find that the trial court did not abuse its discretion in instructing the jury with regard to the issue of flight. Eddy, through his first proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced.

SECOND PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied due process of law when the court instructed on self-defense and gave a conflicting instruction with reference to leaving the scene.

{¶10} Eddy argues that appellate counsel was deficient for failing to argue inconsistent jury instruction with regard to the issue of flight and self-defense.

{¶11} The failure of Eddy to object to the trial court's jury instruction, with regard to flight and self-defense, waived all error except for plain error. We find no plain error because Eddy has failed to demonstrate prejudice such that a manifest miscarriage of justice has occurred. *Jackson*, *supra*. It should also be noted that Eddy argued self-defense through his testimony and that the trial court did not abuse its discretion in instructing the jury with regard to the issue of self-defense. *Howard*; *Martens*. Eddy, through his second proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced on appeal.

THIRD PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied due process of law when the court denied a motion for judgment of acquittal when no alleged victim appeared to testify.

{¶12} Eddy argues that the trial court's jury instruction with regard to the offense of felonious assault was deficient because the jury instruction failed to include the identity of the victim.

{¶13} Eddy failed to object to the jury instruction, thus waiving all but plain error. *Howard,* 8th Dist. Cuyahoga No. 10094; *Martens,* 90 Ohio App.3d 338, 629 N.E.2d 462 (3d Dist.1993). In addition, the identity of the victim is not an element of the offense of felonious assault. *State v. Johnson,* 6th Dist. Lucas No. L-13-1267, 2016-Ohio-1394. Thus, the trial court was not required to include the identity of the victim in the jury instruction provided to the jury with regard to the offense of felonious assault. Eddy, through his third proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced on appeal.

FOURTH PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied due process of law when he was convicted of discharging a firearm over a public road or highway.

{¶14} Eddy argues that he was improperly convicted of the offense of discharging a firearm over a public road or highway, as charged in Count 2 of the indictment, because the discharge of a weapon occurred in a private parking lot.

{¶15} Eddy's fourth proposed assignment of error is frivolous. Count 2 of the indictment, discharge of a firearm on or near prohibited places in violation of R.C. 2923.162(A)(3), was dismissed by the trial court pursuant to Crim.R. 29.

> THE COURT: Your objection is noted. Mr. Willis, you obviously agree. I'm going to grant Rule 29 as to Count 2. I'm going to instruct the jury to disregard Count 2.

{¶16} Eddy, through his fourth proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced on appeal.

FIFTH PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied effective assistance of counsel when no motion to suppress was filed.

{¶17} Eddy argues that he was prejudiced by the failure of trial counsel to file a motion to suppress because the police lacked probable cause to seize him and any evidence derived from the illegal arrest, including statements, should have been suppressed.

{¶18} Eddy did not raise the issue of unconstitutional seizure at trial and has thus waived any objection, on appeal, to the admission of any seized evidence. *State v. Wade*, 53 Ohio St.2d 182, 373 N.E.2d 1244 (1978); *State v. Chandler*, 8th Dist. Cuyahoga No. 81817, 2003-Ohio-6037.

{¶19} Even if Eddy had raised the issue of an improper arrest and seizure, we find that a motion to suppress would have failed because the stop of Eddy was constitutional based upon a reasonable suspicion or probable cause. An investigative stop is within constitutional parameters if the police officer is able to cite articulable facts that give rise to a reasonable suspicion of criminal behavior. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "The test for probable cause is: 'whether at the moment the facts and circumstances within their knowledge and of which they had reasonable

trustworthy information were sufficient to warrant a prudent man in believing that petitioner had committed or was committing an offense.'" *State v. Molek*, 11th Dist. Portage No. 2001-P-0147, 2002-Ohio-7159, ¶ 25, citing *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct 223, 13 L.Ed.2d 142 (1964).

{¶20} Herein, the record demonstrates that the arresting police officers were justified in stopping and arresting Eddy.

> A. While we were patroling this area looking for these two shooters, a female flagged us down right at this little wedge shape here (indicating.) I'm trying not to touch your screen.
>
> A female flagged us down. She was seated in a car and she had stated that a male with a white T-shirt had just jumped into a Volkswagen SUV; that he had a gun in his hand.
>
> Q. And I'm going to just pause you for a second. I just want to get all these map-related questions out while you're here.
>
> Where was the woman in the vehicle on the map, if you could point that out?
>
> A. Again, this is going by memory; I think she was here (indicating) at this intersection which is Griffing and Livingston. But she may have been at South Moreland and Livingston. It was somewhere in this short little area here.
>
> Q. And based on what she said, were you able to observe the vehicle she was talking about?
>
> A. Yes. The vehicle was westbound on Griffing, the one that she pointed out to us.
>
> Q. And I believe that we're good with the map for a little bit so you can retake your seat.
>
> A. Okay.

Q. So thank you for that. Now, the vehicle that you observed, can you describe for the jury what that vehicle was?

A. It was a Volkswagen SUV. I believe it's called a Touareg or Touareg.

Q. And what color was it?

A. That I can't remember. I'd have to refer back to the report.

Q. So what did you do once you observed this vehicle?

A. Once we observed the vehicle — and the female was pretty adamant that the male that she saw with the gun get into at that vehicle — I broadcast to radio our location, the direction of the vehicle. The direction it was heading in which was westbound on Griffing, and asked for other cars to come and back us up.

Tr. 148-149.

{¶21} It must also be noted that Eddy was provided with his *Miranda* rights prior to arrest.

Q. Now, you told us that he was Mirandized on the scene at 116th and Melba; he was given his rights and told that he has a right to an attorney and right to remain silent, right?

A. Well, I did not Mirandize him.

Q. Somebody did.

A. Yes.

Q. Right. And as I said he was taken to the central police station, correct? And then he was later charged.

A. Correct.

Tr. 185.

{¶22} Based upon the testimony adduced at trial, Eddy's seizure and arrest was based on reasonable suspicion and probable cause. *State v. Njogu*, 8th Dist. Cuyahoga No. 82835, 2003-Ohio-6877. Eddy was also provided with a *Miranda* warning before his arrest. Eddy, through his fifth proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced on appeal.

SIXTH PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied a fair trial when the court allowed Det. McKay to interpret a video.

{¶23} Eddy's sixth proposed assignment of error is barred from further review, by the doctrine of res judicata, because the issue was previously raised upon direct appeal and found to be without merit. *Eddy,* 8th Dist. Cuyahoga No. 104417, 2017-Ohio-7412, at ¶ 61. *See also State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Dial*, 8th Dist. Cuyahoga No. 83847, 2007-Ohio-2781; *State v. Ballinger*, 8th Dist. Cuyahoga No. 79974, 2003-Ohio-145. Eddy, through his sixth proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced on appeal.

SEVENTH PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied due process of law when the court improperly expanded the definition of cause.

{¶24} Eddy did not object to the trial court's jury instruction with regard to the definition of cause and has thus waived all but plain error. *Howard; Martens*. In addition, appellate courts have found that where a jury instruction tracks the language of the corresponding Ohio Jury Instruction there is no plain error with the instruction. *State v. Harwell*, 2d Dist. Montgomery No. 25852, 2015-Ohio-2966. *See also State v. Moore*, 163 Ohio App.3d 23, 2005-Ohio-4531, 836 N.E.2d 18 (2d Dist.); *State v. Perry*, 8th Dist. Cuyahoga No. 43992, 1982 WL 2506 (July 29, 1982).

{¶25} Ohio Jury Instructions ("O.J.I."), CR Section 417.23 defines "cause" and "natural consequences" in the following manner:

> 1. CAUSE. The state charges that the act or failure to act of the defendant caused (death) (physical harm to [person] [property]). Cause is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence directly produces the (death) (physical harm to [person] [property]), and without which it would not have occurred.
>
> 2. NATURAL CONSEQUENCES. The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act or failure to act. The defendant is also responsible for the natural and foreseeable (consequences) (results) that follow, in the ordinary course of events, from the act or failure to act.

{¶26} The trial court instructed the jury consistent with section 417.23 of the Ohio Jury Instructions with regard to the definition of cause:

> The State charges that the act or failure to act of the defendant caused physical harm to John Doe. Cause is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence

> directly produces the physical harm and without which it would not have occurred.
>
> The defendant's responsibility is not limited to the most obvious result of defendant's act or failure to act.
>
> The defendant is also responsible for the natural and foreseeable consequences or results that follow in the ordinary course of events from the act or failure to act.

Tr. 393.

{¶27} The trial court's instruction as to cause tracked the standard Ohio Jury Instructions charge and, therefore, was a correct statement of the law. We find no plain error associated with the trial court's instruction as to cause. Eddy, through his seventh proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced on appeal.

EIGHTH PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied due process of law when the court did not require any culpable mental state of count two.

{¶28} As stated with regard to Eddy's fourth proposed assignment of error, Count 2 of the indictment was dismissed by the trial court. Thus, any argument relating to Count 2 of the indictment is frivolous and without merit.

NINTH PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied due process of law when the court failed to give a unanimity instruction concerning felonious assault.

{¶29} Eddy argues that the trial court committed plain error by failing to provide the jury with a unanimity jury instruction.

{¶30} The Supreme Court of Ohio has established that although a jury must be unanimous "as to guilt of the single crime charged, * * * [u]nanimity is not required, * * * as to the means by which the crime was committed so long as substantial evidence supports each alternative means." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 49.

{¶31} Herein, this court has already determined that sufficient evidence was presented at trial to support Eddy's conviction for the offense of felonious assault.

> Eddy first argues that the state failed to present sufficient evidence that he committed felonious assault. We disagree. In order to prove that Eddy committed felonious assault under R.C. 2903.11(A)(2), the state had to present evidence that showed beyond a reasonable doubt that Eddy knowingly caused or attempted to cause physical harm to another by means of a deadly weapon. According to the video presented at trial, Eddy can be seen getting out of his vehicle, quickly putting his arm over his car, and pointing what appears to be a gun in the direction of the unknown male. Although a gun cannot clearly be seen in Eddy's hand because the video is slightly blurry, the video is strong circumstantial evidence that Eddy had a gun in his hand and fired it toward the unknown male. After firing the first shot, Eddy then quickly pulled his arm back down, and ducked down. A second or two later, Eddy got up again and appeared to shoot toward the male a second time. Further, it is clear from the video that Eddy and the unknown male were shooting at each other. This evidence is sufficient evidence that Eddy caused or attempted to cause harm to another by means of a deadly weapon.

Eddy, 8th Dist. Cuyahoga No. 104417, 2017-Ohio-741, at ¶ 36.

{¶32} Because sufficient evidence was adduced at trial to support each alternative means for committing the offense of felonious assault, we find no plain error. *State v. Nields*, 93 Ohio St.3d 6, 752 N.E.2d 859 (2001); *State v. Cook*, 65 Ohio St.3d 516, 605 N.E.2d 70 (1992). Eddy, through his ninth proposed assignment of error, has failed to

demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced on appeal.

TENTH PROPOSED ASSIGNMENT OF ERROR

> Defendant was denied due process of law when the court did not fully define what constituted an attempt.

{¶33} Eddy argues that the trial court's jury instruction was improper because it failed to comply with the language contained in R.C. 2923.02.

{¶34} Eddy has waived all but plain error with regard to the trial court's jury instruction as to attempt, because no objection was made at trial.

{¶35} Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043; *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 656 N.E.2d 643 (1995). We further find no plain error associated with the trial court's instruction on attempt.

{¶36} The trial court's jury instruction with regard to attempt provided that:

> An attempt. An attempt occurs when a person knowingly engages in conduct that if successful would result in physical harm.

{¶37} The trial court's jury instruction sufficiently mirrored the language contained within R.C. 2923.02(A) and O.J.I. CR 523.02. Plain error does not exist

because, even without a verbatim recitation of the language contained in R.C. 2923.02(A) and O.J.I. CR 523.02, the jury was properly instructed as to issue of attempt. Eddy, through his tenth proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced on appeal.

{¶38} Accordingly, the application for reopening is denied.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
TIM McCORMACK, J., CONCUR