[Cite as *State v. Benford*, 2011-Ohio-564.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. WILLIAM P. BENFORD Appellant	C.A. No. 25298 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 07 11 3884 (A)

DECISION AND JOURNAL ENTRY

Dated: February 9, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} In the pre-dawn hours of October 19, 2007, a fistfight broke out among a group of people drinking at an after-hours place on Bachtel Avenue in Akron. When the crowd cleared, Anthony Jackson lay dead in the street. The State charged William Benford with murder, felonious assault, and felony murder. Ultimately, the jury acquitted Mr. Benford of murder, but convicted him of felonious assault and felony murder. He has appealed, arguing: (1) that the trial court should have dismissed the case against him with prejudice following his first trial, which ended in a mistrial; (2) that the trial court should have granted his second motion to dismiss based on the State's misconduct in intentionally withholding exculpatory information; (3) that the trial court incorrectly failed to grant his motion to amend judgment to conform to the verdict form; (4) that the trial court incorrectly convicted him of felony murder based on a defective indictment when multiple errors followed the indictment; (5) that his convictions are

based on insufficient evidence; (6) that his convictions are against the manifest weight of the evidence; and (7) that he was denied his Sixth Amendment right to effective assistance of counsel. Mr. Benford's convictions are affirmed because: (1) he requested the mistrial; (2) there was no evidence of a discovery violation between trials and no evidence the State intended to goad Mr. Benford into moving for a mistrial; (3) he was convicted of the lowest level offense available under the statute he was charged with violating; (4) the indictment was not defective for failure to include a mens rea for felony murder because it tracked the language of the statute; (5) his convictions are based on sufficient evidence; (6) his convictions are not against the manifest weight of the evidence; and (7) he was not denied effective assistance of counsel.

BACKGROUND

{¶2} Anthony Jackson was beaten to death while at an after-hours place celebrating his thirty-second birthday with his best friend, Lamar Stallings. Multiple eyewitnesses told conflicting stories about the details, but it seems that Mr. Jackson became involved in a group fistfight after an argument between Mr. Stallings and a female patron, Leondra Turner, became a physical altercation. Sometime near four or five in the morning, after a long night of drinking, at least three women and three men began fist-fighting in the street outside the after-hours house. After a few minutes, several vehicles abruptly pulled up in the middle of the street and several men jumped out and became embroiled in the melee. One of those men was wielding a handgun. After hitting Mr. Stallings on the head with the gun, the man began firing and chased Mr. Stallings away. The man with the gun then approached the group of men still fighting in the street. He struck Mr. Jackson over the head with the gun, causing him to fall face down on the ground. According to witnesses, Mr. Jackson never again stood up. A group of men continued to beat him, kicking and jumping on him until he was near death. Finally, the men left the area

and, at some point, a witness called for an ambulance. By the time help arrived, Mr. Jackson was dead.

{¶3} Mr. Benford was charged with murder, felonious assault, and felony murder in connection with Mr. Jackson's death. In April 2008, the State tried Mr. Benford on the pending charges. Two days into the trial, Mr. Benford learned that the police had failed to produce recordings of interviews conducted with one or more of the State's witnesses. Mr. Benford moved for dismissal of all charges with prejudice. The trial court declared a mistrial, discharged the jury without prejudice to the prosecution, and rescheduled the trial. In June 2008, the State retried Mr. Benford. Although Mr. Benford again moved for dismissal, the trial court denied the motion. The jury found Mr. Benford not guilty of murder, but guilty of felonious assault and felony murder. The trial court sentenced him to serve fifteen years to life in prison for felony murder with a concurrent eight years for felonious assault. The trial court denied Mr. Benford's post-trial motions to arrest and to amend the judgment.

{¶4} Mr. Benford attempted to appeal the judgment, but, in September 2009, this Court dismissed appeal number 24340 by journal entry due to a void sentence caused by an error in the imposition of post-release control. The original sentencing entry mistakenly indicated that Mr. Benford was subject to a discretionary five-year term of post-release control. On remand, the trial court corrected Mr. Benford's sentence under Section 2929.19.1 of the Ohio Revised Code. On February 17, 2010, the trial court issued a corrected sentencing entry indicating that Mr. Benford would be subject to a mandatory three-year term of post-release control after being released from prison. See R.C. 2967.28(B)(2). Mr. Benford has appealed that entry, assigning eight errors for review.

MISTRIAL WITHOUT PREJUDICE

{¶5} According to Mr. Benford, "[t]he trial court granted [his] motion to dismiss without prejudice." His first assignment of error is that the trial court incorrectly failed to "dismiss the case with prejudice" due to the prosecution's withholding of exculpatory evidence. The focus of his argument is that the dismissal should have been with prejudice because the second trial violated double jeopardy protections.

{¶6} Due to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, criminal defendants may not be subjected to repeated prosecutions for the same offense. *State v. Loza*, 71 Ohio St. 3d 61, 70 (1994) (citing *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982)). Generally, however, if "a trial court grants a criminal defendant's request for a mistrial, the Double Jeopardy Clause does not bar a retrial." *Id.* (citing *Kennedy*, 456 U.S. at 673). The Ohio Supreme Court has adopted "[a] narrow exception" to that rule that applies if "the [defendant's] request for a mistrial is precipitated by prosecutorial misconduct that was intentionally calculated to cause or invite a mistrial." *Id.* "Only where the prosecutorial conduct in question is intended to 'goad' the defendant into moving for a mistrial may defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.* (citing *Kennedy*, 456 U.S. at 676).

{¶7} On April 30, 2008, after two days of the first trial, Mr. Benford moved, both orally and in writing, for dismissal with prejudice of all charges against him based on discovery violations. Mr. Benford's written motion did not mention the term "mistrial," and his lawyers did not use that term in discussions with the trial court. On the record, however, the trial court addressed Mr. Benford's lawyer outside the presence of the jury, saying, "the Court's going to

grant your motion for mistrial . . . . [and] will reschedule the trial and I can do that right now." Mr. Benford's lawyer responded, "Okay." Meanwhile, the State objected to the granting of the mistrial, arguing that a continuance was the more appropriate sanction under the circumstances. The parties proceeded to work with the trial court to reschedule the trial for early June. Although it was not clear from Mr. Benford's written motion or verbal discussions in court that he was seeking a mistrial, on May 1, 2008, the trial court entered a journal entry declaring a mistrial and "discharged [the] [j]ury without prejudice to the prosecution of [the] case." Thus, it is clear that the trial court construed Mr. Benford's written and oral motions to dismiss with prejudice as motions for a mistrial, and Mr. Benford's lawyer did not object to that characterization.

{¶8} Just before the second trial began, Mr. Benford again moved for dismissal of all charges with prejudice. In that motion, Mr. Benford's lawyer explained that "[u]pon request of [Mr. Benford], this Court declared a mistrial[.]" Therefore, it seems that Mr. Benford did request a mistrial and he felt his motion had been at least partially granted, but the trial court had denied his request to dismiss the case against him with prejudice, leading to this first assignment of error.

{¶9} Mr. Benford filed his initial motion to dismiss after discovering during the cross-examination of Kendra Horton that, despite his discovery requests, he had not been provided a CD recording of her first interview with police. After further discussions with the prosecutor, it became apparent that the police may have recorded interviews with a total of three witnesses, but failed to supply those recorded interviews to the prosecutor's office. Mr. Benford accused the Akron Police Department of intentionally withholding the materials, at least one of which allegedly contained exculpatory evidence.

{¶10} In granting the mistrial, the trial court noted that it found no intentional wrongdoing. The knowledge of the Akron Police Department is imputable to the prosecution for purposes of determining whether the prosecution violated the discovery process under Rule 16 of the Ohio Rules of Criminal Procedure. *State v. Wiles*, 59 Ohio St. 3d 71, 78 (1991). Since the Akron Police Department was aware that it had made and maintained CDs of witness interviews in this case and the prosecution failed to produce them in response to a valid request, there is some evidence that the State violated the rule. For purposes of double jeopardy analysis, however, a discovery violation is not sufficient to raise a bar to retrial. In this case, there is no indication that the State desired to provoke Mr. Benford to request a mistrial. Regardless of whether it was negligence or intentional misconduct, the violation occurred before trial. There is no indication that, before the trial had begun, the police or the prosecutor planned to gain some advantage by forcing a mistrial. Therefore, because the defendant requested the mistrial and the exception does not apply in this situation, double jeopardy does not bar retrial. *State v. Loza*, 71 Ohio St. 3d 61, 70 (1994) (citing *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982)).

{¶11} Mr. Benford has cited *Brady v. Maryland*, 373 U.S. 83, 87 (1963), for the proposition that dismissal with prejudice was proper regardless of whether the prosecution engaged in intentional or merely negligent wrongdoing. The State has correctly argued that *Brady* does not apply in this circumstance because it is limited to post-trial discovery of exculpatory information. *State v. Adams*, 9th Dist. No. 07CA0086, 2008-Ohio-4939, at ¶10 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Mr. Benford's first assignment of error is overruled.

DENIAL OF MOTION TO DISMISS

{¶12} Mr. Benford's second assignment of error is that the trial court incorrectly denied his second motion to dismiss based on the State's misconduct in intentionally withholding exculpatory information between the time of the mistrial and the second trial. Despite the wording of the assignment of error, Mr. Benford's argument is that the second trial was barred by principles of double jeopardy. According to Mr. Benford "the police intended to 'goad' [him] into moving for a mistrial" in the second trial.

{¶13} Mr. Benford's second motion to dismiss was based on allegations that, at the time of the second trial, the State continued to withhold a recorded statement of witness Chantel Dortch and that Summit County Sheriff's Deputies had taken pictures of Mr. Benford's tattoos and threatened to charge him with gang-related activities. Mr. Benford apparently intended to move, under Rule 16(L)(1) of the Ohio Rules of Criminal Procedure, for the trial court to dismiss all charges against him with prejudice as a sanction for the State's violation of the discovery rules. Under Criminal Rule 16, a trial court may order an offending party to allow inspection of undisclosed material, grant a continuance, exclude the evidence, or "make such other order as it deems just under the circumstances." Crim. R. 16(L)(1) (formerly Crim. R. 16(E)(3)).

{¶14} Mr. Benford's only argument in support of this assignment of error is that his motion should have been granted because the second trial was barred by double jeopardy because of the mistrial granted during the first trial. But, his argument is that he was goaded into moving for a mistrial at the beginning of the second trial, during which no mistrial was granted.

{¶15} In any event, the trial court ruled that there was no discovery violation between the two trials. To the extent that the trial court found a discovery violation in this case, it ruled on that violation by granting the mistrial during the first trial. By the beginning of the second

trial, the State had produced all known CDs and typed transcripts of each of the missing witness statements, including one of Chantel Dortch. There was no evidence that a second recorded statement of Ms. Dortch existed and no evidence that the State continued to withhold any witness statements. Mr. Benford has not explained how deputies allegedly taking photos of his tattoos constituted a discovery violation. He said that the deputies threatened to bring gang-related charges against him, but no such charges were ever brought and Mr. Benford made no statements to the deputies. Thus, it is not clear how Mr. Benford could have been prejudiced by this incident or how the allegations, if true, constitute evidence of a discovery violation. Therefore, Mr. Benford has not shown that the trial court incorrectly denied his motion. His second assignment of error is overruled.

VERDICT FORM

{¶16} Mr. Benford's third assignment of error is that the trial court incorrectly failed to grant his motion to amend judgment to conform to the verdict form. Mr. Benford has argued that the felonious assault verdict form was sufficient to convict him of assault, but not felonious assault, because it failed to include the degree of the offense or a finding of an additional element to enhance the offense level.

{¶17} Under Section 2945.75(A)(2) of the Ohio Revised Code, "[w]hen 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." The Ohio Supreme Court has held that "the clear language of R.C. 2945.75" requires a verdict form signed by a jury to "include either the degree of the offense of which the defendant is convicted or a statement that an aggravating

element has been found to justify convicting a defendant of a greater degree of a criminal offense." *State v. Pelfrey*, 112 Ohio St. 3d 422, 2007-Ohio-256, at ¶14. If the verdict form fails to include either one, the defendant may be convicted of only the least degree available under the statute with which he was charged. *Id.*

{¶18} In this case, Mr. Benford was charged with felonious assault under Section 2903.11(A)(1) of the Ohio Revised Code. Contrary to Mr. Benford's argument, simple assault is not included in the felonious assault statute. See R.C. 2903.11; 2903.13. The least degree of offense available under the statute with which he was charged is a second-degree felony. R.C. 2903.11(D)(1)(a). Therefore, because the verdict forms in this case included neither the degree of the offense or a statement that an aggravating element was found to justify an enhancement to a greater degree, Mr. Benford may be convicted of only a second-degree felony. As the sentencing entry correctly reflects a second-degree felony conviction for felonious assault, Mr. Benford's third assignment of error is overruled.

DEFECTIVE INDICTMENT

{¶19} Mr. Benford's fourth assignment of error is that his conviction for felony murder must be reversed because the indictment did not include a mens rea for felony murder and multiple errors followed the indictment. Citing Section 2901.21(B) of the Ohio Revised Code, Mr. Benford has argued that, because the felony murder statute does not specify a mens rea, the applicable mens rea is recklessness and his indictment is defective for failure to reference it. Citing *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624 and *State v. Colon*, 119 Ohio St. 3d 204, 2008-Ohio-3749, he has argued that the trial court incorrectly denied his motion to arrest judgment. Mr. Benford has also relied on *State v. Colon*, 2008-Ohio-1624, for the proposition

that a defendant can challenge for the first time on appeal an indictment that omits an essential element of a crime.

{¶20} "[A] person commits felony murder [under] R.C. 2903.02(B) by proximately causing another's death while possessing the mens rea element set forth in the underlying felony offense." *State v. Fry*, 125 Ohio St. 3d 163, 2010-Ohio-1017, at ¶43. Thus, even under *Colon*, the Ohio Supreme Court held that a felony murder count need not include a mens rea provided the mens rea is stated for the predicate offense. *Id.* The Ohio Supreme Court, however, has recently overruled its decisions in *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624, and *State v. Colon*, 119 Ohio St. 3d 204, 2008-Ohio-3749, holding that "[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state." *State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830, at paragraph one of the syllabus. Furthermore, the Ohio Supreme Court has held that, "[b]y failing to timely object to a defect in an indictment, a defendant [forfeits] all but plain error on appeal." *Id.* at paragraph three of the syllabus.

{¶21} Mr. Benford did not object to the indictment prior to trial, so he has forfeited all but plain error in regard to this assignment of error. Mr. Benford's indictment is not defective for failure to include a mens rea for felony murder because the indictment tracked the language of Section 2903.02(B) of the Ohio Revised Code, which does not specify a mens rea. *State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830, at paragraph one of the syllabus. Therefore, Mr. Benford's fourth assignment of error is overruled.

SUFFICIENCY

{¶22} Mr. Benford's sixth and seventh assignments of error are that the trial court incorrectly denied his motion for acquittal because the evidence was insufficient to permit a

logical determination beyond all reasonable doubt that he committed the crimes of felony murder and felonious assault. According to Mr. Benford, he was not present when Mr. Jackson was being beaten, he had no gun, and other people were seen assaulting the victim.

{¶23} Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. We must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of Mr. Benford's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶24} Mr. Benford was convicted of felonious assault and felony murder. Under Section 2903.11(A)(1), "[n]o person shall knowingly . . . [c]ause serious physical harm to another . . . ." "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). Under Section 2903.02(B), "[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 . . . ."

{¶25} Mr. Benford's sufficiency argument is vague at best. Rather than attacking the State's evidence in support of certain elements of either crime, he has merely attacked three factual issues. First, he has argued that he "was not present when Mr. Jackson was being beaten." Chantel Dortch testified that Mr. Benford, a man in a black shirt with a gun, and two additional men "jumped" Mr. Jackson after Mr. Stallings ran away. She further said that, after Mr. Jackson fell to the ground, Mr. Benford was among the men she saw kicking and punching

him. Kendra Horton also testified that she saw Mr. Benford kicking Mr. Jackson after he had fallen to the ground. Therefore, the State presented sufficient evidence that Mr. Benford was present and participated in the beating of Mr. Jackson.

{¶26} Next, Mr. Benford has argued that other people were seen assaulting Mr. Jackson. It is unclear to this Court how Mr. Benford believes that the actions of other people might affect the sufficiency of the evidence against him. Various witnesses testified that a group of men was kicking and punching Mr. Jackson that night. More than one person testified that Mr. Benford was among those men still beating Mr. Jackson when he was lying motionless on the ground. Furthermore, the forensic pathologist testified that Mr. Jackson suffered multiple injuries to the face as well as to the sides, top, and back of the head. The doctor further testified that Mr. Jackson died of acute brain swelling caused by blunt force trauma to the head. Viewed in a light most favorable to the prosecution, the testimony was sufficient to allow an average finder of fact to believe, beyond a reasonable doubt, that Mr. Benford knowingly caused Mr. Jackson serious physical harm and that he caused Mr. Jackson's death as a proximate result of committing or attempting to commit felonious assault, which is a felony of the second degree. R.C. 2903.11(A)(1); R.C. 2903.02(B).

{¶27} Mr. Benford's final argument regarding sufficiency is that he had no gun. Mr. Benford is correct that there was no evidence in the record indicating that he had a gun that night. Mr. Benford has not made any argument under these two assignments of error regarding how his not having a gun relates to his assertion that the State failed to present sufficient evidence of his guilt. App. R. 12(A)(2). As this Court has determined that there was sufficient evidence on both counts, Mr. Benford's sixth and seventh assignments of error are overruled.

MANIFEST WEIGHT OF THE EVIDENCE

{¶28} Mr. Benford's fifth assignment of error is that his convictions for felony murder and felonious assault are against the manifest weight of the evidence. If a defendant argues that his convictions are against the manifest weight of the evidence, this Court "must review the entire record, 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." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶29} The jury convicted Mr. Benford of "knowingly . . . [c]aus[ing] serious physical harm to another," R.C. 2903.11(A)(1), and "caus[ing] the death of another as a proximate result of . . . committing or attempting to commit an offense of violence that is a felony of the first or second degree . . . ." R.C. 2903.02(B). The Ohio Supreme Court has held that a defendant may be convicted of a principal offense based on proof that he was complicit in its commission. *State v. Herring*, 94 Ohio St. 3d 246, 251 (2002). This is true even if the indictment does not mention complicity. *Id.* A defendant may be found guilty of the principal offense if the evidence shows that he "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that [he] shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St. 3d 240, syllabus (2001). Criminal intent "may be inferred from the circumstances surrounding the crime." *Id.* at 245. In this case, the jury received an instruction regarding complicity and found Mr. Benford guilty of felonious assault and felony murder. Thus, the question is whether the jury clearly lost its way and created a manifest miscarriage of justice in finding either that Mr. Benford committed the principal offenses or was complicit in their commission.

{¶30} Mr. Benford has argued that he acted in self-defense when Mr. Jackson and Mr. Stallings attacked him for attempting to help Leondra Turner. He has argued that there was no evidence that he ever had a gun and he left immediately after the first shots were fired. Furthermore, at least some witnesses testified that Mr. Benford had left the area as soon as the shots were fired so that he could not have been among the group of men beating Mr. Jackson to death.

{¶31} The State presented four eyewitnesses, two of whom were involved in the fight and two of whom were not. Delicia Davis and Chantel Dortch testified that they merely watched the fight that night. Ms. Davis said that the fight started inside the Bachtel house when her cousin, Lamar Stallings, spilled a drink on Leondra Turner. According to Ms. Davis, Ms. Turner became enraged and demanded that Mr. Stallings buy her a replacement drink. When Mr. Stallings refused, the bartender diffused the situation by giving Ms. Turner a free drink. Ms. Davis testified, however, that the situation escalated again when her other cousin, Shannon, became upset and started speaking negatively about Ms. Turner to Mr. Stallings. Ms. Turner then became upset again and tried to fight Shannon, but Mr. Stallings stopped Ms. Turner by grabbing her by the throat and throwing her into a nearby sink. At that point, Mr. Benford came into the room and grabbed Mr. Stallings to get him off of Ms. Turner. Mr. Jackson then attempted to help Mr. Stallings by attacking Mr. Benford. Ms. Davis testified that she and the bartender tried to break up the fight and other people helped to separate the participants, sending Mr. Jackson and Mr. Stallings outside.

{¶32} During the lull, Ms. Davis heard Mr. Benford talking on his cell phone. The State offered Mr. Benford's cell phone records at trial to show that he had called Andre Colvin from the Bachtel Avenue house. According to Ms. Davis, Mr. Benford said something like "get here"

or "I'm about to fight." Minutes later, outside the house, Ms. Davis saw the bartender up the street trying to keep Mr. Benford from fighting with Mr. Jackson while Ms. Turner and Shannon were fighting in a neighboring yard. According to Ms. Davis, "[q]uite a few people" started fighting Mr. Stallings after he kicked Ms. Turner's friend, Kendra Horton, in the back. Ms. Davis testified that she saw a truck pull up and a man jump out and shoot off a gun. That's when she ran for the house. She said that, when the truck arrived, Mr. Benford pushed the bartender away and ran toward the fight, while, as the shooting started, most other people ran away or hid in the house. From an upstairs window, Ms. Davis saw about five men fighting Mr. Jackson, but she could not say for sure whether Mr. Benford was among them. She did say that, as she was running toward the house for cover, she saw Mr. Benford walking toward Mr. Jackson and that she "think[s] they started fighting."

{¶33} The State also called Chantel Dortch to testify. She said that she saw a man in a striped shirt kick a woman in the back and knock her to the ground. Then Mr. Benford and another man started fighting with the man in the striped shirt. After a couple of minutes, some vehicles pulled up and a man with a gun got out and hit the man in the striped shirt with the gun, then shot at him, chasing him away. According to Ms. Dortch, the man with the gun then hit the victim in the head with the gun. When the victim fell down, the man continued to hit him in the head with the gun while the rest of the men, including Mr. Benford, kicked and punched him. When the men got into their vehicles and drove away, Ms. Dortch could see the victim trying to pull himself up out of the street toward the sidewalk. She called 911 to request an ambulance.

{¶34} The State's other two eyewitnesses were Kendra Horton and Lamar Stallings. Ms. Horton testified that she was charged with murder and felonious assault in connection with Mr. Jackson's death and she pleaded guilty to felonious assault. Ms. Horton said that she went to

the Bachtel house that night with her friend, Ms. Turner. Ms. Horton testified that, before the fighting started, Ms. Turner had called Mr. Benford and arranged for him to meet her at the after-hours place. Ms. Horton testified that she did not recall anything about a drink being spilled on Ms. Turner that night and she never saw Ms. Turner fighting with a man. Instead, Ms. Horton said that she was arguing with a woman outside the Bachtel house in an effort to collect some money the woman owed her brother for crack cocaine. She said someone hit her from behind and she fell to the ground and was suddenly being beaten by many people for some unknown reason. Finally, somebody started getting people off of her and, when she got up, she saw Mr. Jackson on the ground with several people, including Andre Colvin and Mr. Benford, kicking him. She assumed that Mr. Jackson must have been one of her attackers, so she joined in. After kicking Mr. Jackson twice herself, she got into Mr. Colvin's car and left the scene. Ms. Horton admitted that she lied to the police during her first interview and blamed various other people for her injuries and for Mr. Jackson's death. She said she was initially trying to protect Mr. Benford, but later decided to tell the truth.

{¶35} Finally, Mr. Stallings, aka "Little," testified about his participation in the fight that night. He said he went to the Bachtel after-hours place with his best friend, Mr. Anthony "Amp" Jackson, to celebrate Mr. Jackson's birthday. He explained that he got into an argument with a woman after he spilled a drink on her in the bar. He admitted that the argument turned physical and caused a lot of commotion inside the bar, so he and Mr. Jackson stepped outside. According to Mr. Stallings, when he again approached the woman, a larger woman started hitting him and then both women attacked him. He admitted that he punched the larger woman in the face and kicked her in the back. After that, Mr. Benford started trying to fight both him and Mr. Jackson, apparently in an effort to defend the women. He said he saw Mr. Jackson

"squared up" with Mr. Benford and two others, including one woman, and he tried to help his friend. As he tried to hit Mr. Benford, someone else blindsided him, striking him with an object he thought was probably a gun. Mr. Stallings fell to the ground, but jumped up and ran away when he saw a man standing behind him with a pistol in his hand. Mr. Stallings ran several houses down the street to where his truck was parked. He could not identify the man with the gun, but saw the man walk back toward Mr. Jackson after firing a shot. Mr. Stallings said that he waited in his truck for Mr. Jackson to join him, but Mr. Jackson never came. After everyone else left the scene, Mr. Stallings drove slowly by the house and saw Mr. Jackson lying motionless in the street.

{¶36} Mr. Benford presented two witnesses who claimed to have seen the fight that evening. Robert Johnson testified that he was standing outside the Bachtel house when he saw Mr. Benford run out of the house with two men chasing him "trying to jump him." According to Mr. Johnson, several men started hitting Mr. Benford while he attempted to defend himself. Mr. Johnson also said that most people ran away when the shooting started. Although he did not see Mr. Benford running away, Mr. Johnson testified that, as he ran between two houses, he saw Mr. Benford's truck pulling off down the street. He also said that, as he fled the scene, he ran right by Mr. Jackson who was still standing in the front yard of the Bachtel house.

{¶37} Antwanette Baskin also testified on behalf of Mr. Benford. She said that she did not know Mr. Benford, but she saw a tall man with tattoos fighting that night among a group of much smaller men. In court, she identified the larger man as Mr. Benford. Ms. Baskin testified that she was outside the Bachtel house when she saw a heavy-set woman fighting with a man in a brown shirt, who was later identified as the victim, Mr. Jackson. She said that Mr. Jackson punched the woman in the face, causing her to slide down the hill. Then a smaller woman

jumped in to help the other woman and a man in a red shirt jumped in to help Mr. Jackson. Ms. Baskin testified that Mr. Benford came out of the house and stopped the men from fighting the heavy-set woman. But, everything changed when a white truck pulled up and two men jumped out. One man had a gun and chased the man in the red shirt away from the fight by firing at him. Most people standing in the street ran away when the man started shooting. Although she did not see Mr. Benford run away, she was sure he had because he and the women were gone after the shooting started. After that, the man with the gun came over to where Mr. Jackson was still fighting with a couple of men. The man with the gun used it to strike Mr. Jackson on the head. Mr. Jackson fell to the ground and never stood back up. According to Ms. Baskin, Mr. Benford was no longer at the scene when Mr. Jackson fell to the ground. Ms. Baskin testified that the smaller men and the man with the gun repeatedly "jump[ed] on [Mr. Jackson's] head" after he fell to the ground.

{¶38} Nearly every witness testified that everyone at the Bachtel house had consumed a large amount of alcohol by the time these events unfolded in the pre-dawn hours of October 19, 2007. Mr. Johnson was the only eyewitness who claimed to be sober, but his recollection of the events lacked the detail of the other accounts and contradicted the bulk of the other eyewitness reports. According to Mr. Johnson, Mr. Benford was only defending himself against Mr. Jackson and one other man who had chased him out of the house, trying to attack him. Mr. Benford's other eyewitness, Ms. Baskin, contradicted Mr. Johnson's testimony. She said that Mr. Benford did not come out of the house until the fight was well under way, but that Mr. Benford had been trying to break up the fight between the two men and the two women before the men turned on him. Ms. Baskin was also the only witness to say that Mr. Jackson, rather

than Mr. Stallings, was the initial aggressor in the fight with the two women. Mr. Stallings contradicted Ms. Baskin by admitting that he physically assaulted both women.

{¶39} One of the State's witnesses testified in much more detail than either Mr. Johnson or Ms. Baskin. Ms. Davis knew the participants and testified in great detail about the entire course of the fight. The jury may also have found her more credible than some of the others because there was no evidence that she was involved in the fight and she told a rather unflattering account of the actions of two of her own family members. According to Ms. Davis, after the initial ruckus, Mr. Benford called someone and seemed to be asking for help in the fight that was about to begin. Minutes later, he was outside trying to fight with Mr. Jackson, but the bartender was trying to keep the peace. Mr. Stallings corroborated this testimony because he also said that the bartender was initially holding Mr. Benford back from attacking Mr. Jackson.

{¶40} That changed when vehicles pulled up and someone started shooting. At that time, as most people were running for cover, Ms. Davis saw Mr. Benford heading for the fight and thought she might have recalled seeing him punch Mr. Jackson. Once she was in the house, she saw five men beating on Mr. Jackson in the street, but could not say for certain whether Mr. Benford was among them. Ms. Dortch, however, said that she saw Mr. Benford among the men who were jumping on Mr. Jackson after he fell to the ground. She also said that, when the three vehicles pulled up, she assumed someone had called these men because they jumped out and started fighting as though they knew what was going on. Kendra Horton also testified that, after joining Mr. Colvin and Mr. Benford in kicking Mr. Jackson, she got into Mr. Colvin's car to leave the scene. Ms. Davis testified that she saw Kendra Horton leaving the scene in one of the vehicles that had pulled up during the fight.

{¶41} Based on the evidence, it was reasonable for the jury to believe that Mr. Benford called a group of people, including Mr. Colvin and the man with the gun, to come to the after-hours house to help him beat up Mr. Jackson and/or Mr. Stallings. Regardless of whether the jury believed the testimony of Ms. Horton and Ms. Dortch, that they saw Mr. Benford kicking Mr. Jackson after he was lying on the ground, it was reasonable for the jury to conclude that the men who arrived in response to Mr. Benford's call chased Mr. Stallings away and beat Mr. Jackson to death. It was reasonable for the jury to conclude that both Mr. Colvin and the unidentified man wielding the gun arrived in response to Mr. Benford's call for help.

{¶42} Additionally, a police officer from Hamilton County testified that, several weeks after Mr. Jackson's death, he stopped Mr. Benford in Cincinnati for a traffic violation. The officer testified that Mr. Benford initially lied about his identity so that, after arresting him, they had to use fingerprints to positively identify him. Once he realized it was Mr. Benford, the officer learned Mr. Benford had an active warrant in Akron. The jury may have reasonably believed that Mr. Benford fled Akron after the incident and attempted to avoid detection because he was conscious of his own guilt.

{¶43} The jury had to judge the credibility of each witness and reconcile the testimony of six eyewitnesses who told somewhat conflicting stories. Based on the evidence, the jury may have reasonably believed that Mr. Benford had knowingly caused Mr. Jackson serious physical harm or that he had "supported, assisted, encouraged, cooperated with, advised, or incited [the principles] in the commission of the crime, and that [he] shared the[ir] criminal intent." *State v. Johnson*, 93 Ohio St. 3d 240, syllabus (2001). Either way, he would be properly convicted of felonious assault, a felony of the second degree. Based on the evidence, the jury also may have reasonably concluded that Mr. Benford, in committing that violent felony, proximately caused

Mr. Jackson's death. Even if the jury did not believe that Mr. Benford was among those beating Mr. Jackson to death after he fell to the ground, they may have reasonably found that he "supported, assisted, encouraged, cooperated with, advised, or incited [the principles] in the commission of the crime, and that [he] shared the[ir] criminal intent." *Id.* Therefore, this Court cannot say that the jury lost its way and created a manifest miscarriage of justice in finding Mr. Benford guilty of violating Sections 2903.11(A)(1) and 2903.02(B) of the Ohio Revised Code. See *State v. Herring*, 94 Ohio St. 3d 246, 251 (2002). Mr. Benford's fifth assignment of error is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶44} Mr. Benford's eighth assignment of error is that he was denied his Sixth Amendment right to effective assistance of counsel. He has argued that he was prejudiced by his lawyers' failure to call various witnesses, including Leondra Turner, unnamed additional eyewitnesses, and a medical expert. He has further argued that he was prejudiced by the fact that his lawyers relied on nicknames and clothing descriptions from witnesses to identify the participants in the fight.

{¶45} "To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St. 3d 378, 388-89 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). In order to demonstrate that the deficient performance caused him prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *State v. Bradley*, 42 Ohio St. 3d 136, 142 (1989) (quoting *Strickland*, 466 U.S. at 694).

{¶46} Mr. Benford has argued that his lawyers were ineffective for failing to call an expert witness "to emphasize that the lethal injuries to [Mr.] Jackson were caused by blows to the head from a foreign object (i.e., [f]irearm)." "A decision by trial counsel not to call an expert witness generally will not sustain a claim of ineffective assistance of counsel." *State v. Conway*, 109 Ohio St. 3d 412, 2006-Ohio-2815, at ¶118 (citing *State v. Coleman*, 45 Ohio St. 3d 298, 307-08 (1989)). In this case, even if such expert testimony were available and would have added to the jury's understanding of the facts, Mr. Benford has not shown that, but for his lawyers' failure to call such an expert, there was a reasonable probability that he would have been acquitted. The State did not need to prove that Mr. Benford had dealt the final death blow to Mr. Jackson in order to convict him of felony murder. Even if an expert had testified that the death was caused by blows to the head from a foreign object, it is not likely to have caused the jury to believe that Mr. Benford was not at least complicit in the death of Mr. Jackson. To the extent that Mr. Benford's eighth assignment of error is focused on his lawyers' failure to call an expert witness, it is overruled.

{¶47} Mr. Benford has also argued that his lawyers were ineffective for failing to call Leondra Turner as a witness because she "played such a key role in the incident." There is nothing in the record to indicate what Ms. Turner would have said had she testified. Mr. Benford has not shown how he would have benefited from Ms. Turner's testimony or how her testimony would have produced a different result at trial. He has not demonstrated that he was prejudiced by his lawyers' failure to call her as a witness at trial. To the extent it was focused on his

lawyers' failure to call Ms. Turner as a witness at trial, Mr. Benford's eighth assignment of error is overruled.

{¶48} Mr. Benford has also argued that his lawyers should have called "many more witnesses on [his] behalf" because there were so many people watching the fight that night. Mr. Benford, however, has not indicated who should have been called or how these unnamed witnesses would have benefited his case. As he has failed to demonstrate prejudice, this part of Mr. Benford's eighth assignment of error is overruled.

{¶49} Finally, Mr. Benford has argued that his lawyers were ineffective because they "did not clearly bring out various issues which were beneficial to him and appeared to confuse the witness thus not fully eliciting the potentially best possible responses." Specifically, Mr. Benford has argued that using nicknames and clothing descriptions to identify people was "flawed and deficient." Although both the prosecutors and Mr. Benford's lawyers elicited testimony from various witnesses that included nicknames or clothing descriptions, they also, when possible, elicited testimony explaining who bore which nickname and what clothing each participant was wearing that night. Mr. Benford has not explained which witness was confused or what responses he would have expected had there been no confusion. As Mr. Benford has failed to demonstrate prejudice resulting from his lawyers' actions, his eighth assignment of error is overruled.

CONCLUSION

{¶50} Mr. Benford's convictions for felonious assault and felony murder are affirmed. The convictions are based on sufficient evidence and are not against the manifest weight of the evidence. Mr. Benford's indictment was not defective, and he was not denied effective assistance of counsel. The trial court did not violate his right against double jeopardy and

correctly denied his motion to amend judgment. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

THOMAS B. SQUIRES, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.