

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	No. 112051
JAHMONTAY HARDER,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED AND REMANDED
RELEASED AND JOURNALIZED: July 13, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-20-653320-B and CR-21-657515-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Fallon Kilbane McNally and Jeffrey Schnatter, Assistant Prosecuting Attorneys, *for appellee*.

P. Andrew Baker, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} Jahmontay Harder appeals his convictions arising from two separate theft offenses in which Harder initially paralyzed one victim and murdered the other

victim, Tavon Powell, with the same firearm. For the following reasons, Harder's convictions are affirmed.

{¶ 2} In May 2020, Harder robbed and shot the first victim in the parking lot of a convenience store. That victim, one of Harder's neighbors, identified Harder as the person who had shot him and who took over \$1,000 in cash. The handgun Harder used jammed after the first shot was fired, and Harder fled. In September 2020, Harder and two others conspired to rob Powell, who had approximately \$20,000 in his apartment. Harder and his accomplices, both of whom testified at his trial, entered Powell's apartment wherein a struggle ensued. During the attempted robbery and burglary, Harder shot Powell several times in the stairwell of the apartment complex after clearing a jammed shell casing that temporarily impeded Harder's ability to discharge the weapon.¹ Before and during the robbery and burglary of Powell, Harder texted his coconspirators regarding the planning and execution of the crime against Powell. Harder deleted those text messages and instructed one of the coconspirators to do the same. According to one of the accomplices, Harder explained his reason for killing Powell — to prevent him from identifying Harder to police officers.

{¶ 3} Harder committed both crimes using the same handgun that was recovered upon Harder's arrest, which was identified through forensic testing of the

¹ The state's weapons expert suggested that Harder was using the wrong ammunition for his weapon and the spent casing would not extract properly for sustained operation of the firearm. When the proper ammunition was used, there was no impediment to the operation of the firearm.

spent shell casings recovered at both crime scenes. The handgun had been disassembled and hidden throughout Harder's residence.

{¶ 4} In two separate indictments, representing each incident, Harder was charged with several crimes. In Cuyahoga C.P. No. CR-20-653320, Harder was charged with nine counts consisting of aggravated murder under R.C. 2903.01(B) (purposely causing the death of Powell while committing an aggravated robbery or burglary); aggravated robbery; aggravated burglary; murder (purposely causing the death of Powell); felony murder; two counts of felonious assault; having weapons while under disability; and tampering with evidence. In Cuyahoga C.P. No. CR-21-657515, Harder was charged with four counts consisting of attempted murder (attempting to purposely cause the death of that victim); aggravated robbery; and two counts of felonious assault. The indictment included numerous specifications, only two of which were implicated at sentencing.

{¶ 5} Without objection, the trial court granted the state's motion to consolidate both indictments for the purposes of trial under Crim.R. 8(A) and 13.² On the morning of trial, Harder's trial counsel sought to "renew" a motion to sever that he mistakenly believed was filed by previous counsel. That was the first and only time the issue of severance was discussed, but no argument in favor of

² During the pretrial proceedings, Harder filed a pro se motion to sever "counts 1-22, Counts 28-30, and counts 31-35" of the indictment. That motion was denied because Harder was represented by counsel and the trial court could not consider the motion. Notwithstanding, the motion was not based on either indictment, which contained 13 counts in total.

severance was presented at that time.³ Instead, Harder relied on the “arguments” already presented.

{¶ 6} After trial, Harder was found guilty of all counts, with the charge of having weapons while under disability being tried to the bench. After merging the allied offenses of similar import, Harder was sentenced to a term of life without the possibility of parole for the aggravated murder of Powell, along with a consecutive three-year firearm specification, and concurrent base terms of 11 – 16.5 years for the attempted murder conviction against the other victim, with another consecutive three-year term on the firearm specification; and three years each on the having weapons while under disability and tampering with evidence convictions. We note, however, that the final entry of conviction does not accurately reflect the sentence imposed at the hearing with respect to the aggravated murder conviction in Case No. CR-20-653320. In the sentencing entry, that sentence imposed under R.C. 2929.03(A)(1)(a) (life imprisonment without parole) was ubiquitously described as “a life term.” In order to avoid any potential confusion, the case is remanded to the trial court solely for the purpose of issuing a nunc pro tunc entry to make the final entry of the convictions reflect that which occurred at the sentencing hearing.

{¶ 7} Harder appealed his convictions, advancing four assignments of error.

³ This statement is based on the recounting of the procedural history according to the parties. *Mayfair Village Condominium Owners Assn. v. Grynko*, 8th Dist. Cuyahoga No. 99264, 2013-Ohio-2100, ¶ 6, citing *Nob Hill E. Condominium Assn. v. Grundstein*, 8th Dist. Cuyahoga No. 95919, 2011-Ohio-2552, ¶ 11; *Concrete Creations & Landscape Design LLC v. Wilkinson*, 7th Dist. Carroll No. 20 CA 0946, 2021-Ohio-2508, ¶ 52.

{¶ 8} In the first assignment of error, Harder claims the trial court “erred when it granted the state’s motion for joinder.” Because Harder did not timely object to the state’s motion, he waived any potential error.

{¶ 9} The joinder of charges that involve similar acts, transactions, or course of criminal conduct, is generally favored. *State v. Harris-Powers*, 8th Dist. Cuyahoga No. 87921, 2007-Ohio-389, ¶ 17, citing Crim.R. 8, and *State v. Dunkins*, 10 Ohio App.3d 72, 460 N.E.2d 688 (9th Dist.1983). A defendant may seek relief from joinder under Crim.R. 14 but only upon a demonstration of prejudice. *Id.*, citing *State v. Owens*, 51 Ohio App.2d 132, 366 N.E.2d 1367 (9th Dist.1975). “A party waives any claim of error concerning the joinder by failing to raise an objection to the joinder.” *Id.*

{¶ 10} Harder failed to object to the joinder of both indictments for the purposes of trial. He did not file an objection to the state’s motion for joinder, or thereafter, a motion to sever the case at any stage of the proceedings. Thus, his attempt to “renew” his nonexistent objection on the morning of trial, in which he solely rested on the “previously filed” arguments, was insufficient to preserve the issue for further review on the merits. *See, e.g., State v. Frazier*, 8th Dist. Cuyahoga Nos. 106772 and 106773, 2019-Ohio-1433, ¶ 11-12 (appellant waived the issue of joinder by failing to object at any stage of the proceedings). Harder did not provide the trial court with any reason to deny the state’s request, and “[a]bsent a timely pretrial request by defendant, a trial court has no duty to order a separate trial.” *State v. Parks*, 8th Dist. Cuyahoga No. 71788, 1997 Ohio App. LEXIS 4644, 4

(Oct. 16, 1997), citing *State v. Gvozd*, 8th Dist. Cuyahoga No. 60748, 1992 Ohio App. LEXIS 2834 (June 4, 1992), and *State v. Knight*, 20 Ohio App.3d 289, 291, 485 N.E.2d 1064 (8th Dist.1984). The first assignment of error is overruled.

{¶ 11} In the second assignment of error, Harder claims his convictions must be reversed because he did not receive effective assistance of counsel. In support, he identifies two areas of deficiency: (1) that trial counsel should have sought a mistrial after the trial court inadvertently began reading the charges under Count 8 (having weapons while under disability) to the jury that were meant for the court to decide; and (2) that trial counsel should have filed an opposition to the state's motion for joinder or a motion to sever the indictments under Crim.R. 14 (relief from prejudicial joinder). Neither argument has merit.

{¶ 12} “[A]ppellate courts generally review ineffective assistance of counsel claims on a de novo basis * * *.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 53. In order to prevail on an ineffective-assistance-of-counsel claim, the defendant must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Grate*, 164 Ohio St.3d 9, 2020-Ohio-5584, 172 N.E.3d 8, ¶ 49. In order to establish prejudice, the defendant must demonstrate there is a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. An offender's “failure to prove either prong of the *Strickland* two-part test makes it unnecessary for a court to consider the other prong.” *State v.*

Eaton, 8th Dist. Cuyahoga Nos. 105926 and 105927, 2018-Ohio-1968, ¶ 21, citing *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), and *Strickland* at 697.

{¶ 13} The lack of the motion for a mistrial was immaterial to the outcome of trial. After the jury was empaneled, the trial court read through the counts of each indictment. After reading the first seven counts of the respective indictment to the jury, the trial court inadvertently began reading

Count 8, having a weapon while under a disability, Jahmontay Harder did knowingly acquire, have, carry, or use any firearm or dangerous ordnance, and he was under indictment for or has been convicted of a felony offense, to wit: On November 13th, 2019, and in Cuyahoga County, Common Pleas Court, Case No.

Harder's counsel interrupted and asked for a sidebar before the court could finish reading the remainder of the charge, which provided the details of the conviction:

* * * CR18-631272, having been indicted for or convicted of the crime of Robbery and/or Felonious Assault, in violation of Revised Code Section R.C. 2911.02(A)(1) and/or R.C. 2903.11(A)(2) of the State of Ohio.

{¶ 14} After a brief sidebar, the parties agreed that what the jury heard would not pose a problem for the trial. After returning to the record for the jury, the court stated: "Sometimes I make a mistake, and my wife says it's more than sometimes, but there is no Count 8. So you'll disregard anything I may have said about a Count 8."

{¶ 15} According to Harder,

the failure to request a mistrial at that point in time constitutes ineffective assistance of counsel under the standard set forth by

Strickland v. Washington, 466 U.S. 688 as there was no strategic reason to not request a mistrial at that point in time (thus, showing a deficient performance, the first prong of *Strickland*) and there was prejudice to Defendant-Appellant (thus, fitting the second prong), as few things could be more prejudicial in a case involving two incidents of firearm related violence than a showing that the defendant already had a criminal record sufficient to preclude him from legally having a firearm in the first place.

Harder primarily relies on the claim that the jury was told of his “criminal record” and essentially is asking for structural error to be declared based on the failure to request a mistrial. The trial court’s disclosure, however, did not reveal a criminal history. The revelation, even if the jury failed to heed the trial court’s admonishment, was limited to the purported allegation that under Count 8, Harder may have been under an indictment for or was convicted of an unspecified felony offense.

{¶ 16} Whether Harder’s trial counsel should have requested a mistrial, in part, comes down to whether such a request would have been successful.

{¶ 17} “A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudicially affect the merits of the case and the substantial rights of one or both of the parties.” *State v. Harmon*, 10th Dist. Franklin No. 17CR-4910, 2020-Ohio-590, ¶ 18, quoting *Tingue v. State*, 90 Ohio St. 368, 108 N.E. 222 (1914), paragraph three of the syllabus. “Where an improper reference to a defendant’s criminal history is ‘fleeting and * * * promptly followed by a curative instruction,’ the trial court does not abuse its discretion by denying the defendant’s motion for a mistrial.” *State v. Smith*, 3d Dist. Seneca No. 13-19-26,

2020-Ohio-427, ¶ 52, quoting *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 174-175, and *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). Harder has not demonstrated that his attorney's failure to request a mistrial constituted ineffective assistance of counsel.

{¶ 18} The disclosure was fleeting and did not disclose Harder's criminal record; it was only disclosed that at one time he was under a felony indictment. *See State v. Payne*, 8th Dist. Cuyahoga No. 105965, 2018-Ohio-1399, ¶ 20 (mistrial unnecessary because the disclosure of the criminal history was brief and unspecific despite the lack of a curative instruction); *State v. Scott*, 6th Dist. Sandusky No. S-19-030, 2020-Ohio-4854, ¶ 27 (no abuse of discretion in overruling a request for mistrial based on the inadvertent disclosure of the defendant's criminal history because the disclosure was brief and the trial court immediately provided a curative instruction). The trial court immediately explained to the jury that there was no Count 8 in the indictment, and therefore, the earlier reading of it was a mistake. *See Garner* at 59 ("the reference to the defendant's prior arrests was fleeting and was promptly followed by a curative instruction" and therefore the trial court did not abuse its discretion in failing to declare a mistrial). The jury was told to disregard that limited discussion, and nothing within this record demonstrates that the jury disregarded the trial court's directive.

{¶ 19} Moreover, the evidence presented at trial was simple and direct. Harder was identified as the perpetrator of the convenience store shooting by the victim and of the murder by his coconspirators. He did not dispute his being present

at the crime scenes but instead focused on the credibility of the witnesses, the nuances of the elements of the crimes as charged, and the state's lack of DNA evidence tying Harder to the crimes. Even if we took the extraordinary step of declaring that his trial counsel rendered a deficient performance by failing to seek a mistrial, based on the limited arguments presented for review, we cannot conclude that the error prejudiced Harder because the jury was never provided any specific information about Harder's criminal record to give the appearance of tainting its verdict.

{¶ 20} With respect to the failure to seek severance or preserve an objection to the state's request for joinder, Harder has not demonstrated that joinder was inappropriate for the purposes of demonstrating a deficient performance. Under Crim.R. 8(A), "[t]wo or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character * * *." In both transactions, months apart, Harder was accused of theft offenses perpetrated with the same handgun and committed against a person known to possess large amounts of cash at any given moment.

{¶ 21} The sole argument as to the dissimilar nature of the crimes under Crim.R. 8(A) is that one was committed in a convenience store parking lot and the other in the common area of an apartment. That is not sufficient. The location of the crime is not an overriding concern. Both crimes were similar in nature and manner of execution. Harder planned the robbery of two victims known to possess

large amounts of cash, and in the commission of both crimes, Harder shot the victim in an attempt to avoid leaving a witness. Although he was unsuccessful in that respect during the first attempt, he succeeded in the second. Both crimes relied on the same evidence establishing Harder's possession and use of the same firearm. Harder's trial counsel was not ineffective in failing to request severance or failing to object to the state's request for joinder.

{¶ 22} Harder has not demonstrated both prongs of the ineffective-assistance-of-counsel analysis for either claim. The second assignment of error is overruled.

{¶ 23} In the third and fourth assignments of error, Harder claims the findings of guilt on the aggravated robbery count and the final convictions for the aggravated murder of Powell and the associated tampering with evidence were based on insufficient evidence or, in the alternative, were against the weight of the evidence.

{¶ 24} We need not address the finding of guilt on the aggravated robbery count. The aggravated robbery finding of guilt merged into the aggravated murder.

{¶ 25} When counts in an indictment are allied offenses that are merged for the purposes of sentencing, the reviewing court need not consider the sufficiency or the weight of the evidence thereon because any error relating to those counts would be harmless. *State v. Ramos*, 8th Dist. Cuyahoga No. 103596, 2016-Ohio-7685, ¶ 14, citing *State v. Powell*, 49 Ohio St.3d 255, 263, 552 N.E.2d 191 (1990); *State v. Tegarty*, 8th Dist. Cuyahoga No. 111855, 2023-Ohio-1369, ¶ 36, citing *State v.*

McFarland, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316, ¶ 25 (considering the sufficiency-of-the-evidence challenge only on those convictions surviving merger), and *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 138 (merger of kidnapping count with aggravated-robbery and aggravated-burglary counts moots sufficiency-of-the-evidence claim regarding kidnapping count); see also *State v. Johnson*, 8th Dist. Cuyahoga No. 111618, 2023-Ohio-1367, ¶ 116. This rationale applies to both sufficiency and manifest weight challenges. *State v. Worley*, 8th Dist. Cuyahoga No. 103105, 2016-Ohio-2722, ¶ 23.

{¶ 26} Harder’s sole claim as to the sufficiency or the weight of the evidence supporting his aggravated murder conviction is based on the claim that (1) the aggravated robbery was not proven because there may have been another motive for the killing (Powell had a relationship with Harder’s significant other, who was also indicted for the death of Powell); (2) the approximately \$20,000 in cash Powell had in his apartment was left behind after his slaying, so the crime was never completed; or (3) that the aggravated burglary had already been committed by the time Harder killed Powell in the stairwell of the apartment, so the killing was unrelated to the crime.

{¶ 27} Under R.C. 2903.01(B), aggravated murder is defined as purposely causing the death of another while committing, or attempting to commit, or while fleeing immediately after committing or attempting to commit, in part, aggravated robbery or aggravated burglary. Thus, the state can prove aggravated murder if the killing is committed while the offender attempts to commit the predicate offense or

is fleeing immediately thereafter. Harder makes no attempt to address the fact that Powell's murder occurred as he was fleeing from the aggravated burglary.

{¶ 28} With respect to the aggravated robbery predicate offense, there is ample evidence in the record demonstrating his intent to steal the approximately \$20,000 in cash that Powell had in his possession. The aggravated murder statute provides for situations in which the aggravated robbery was unsuccessfully attempted, and therefore, there is no merit to Harder's argument that he failed to complete the crime.

{¶ 29} And since motive is irrelevant under Ohio criminal law, whether Harder may have had another motive to target Powell for the purposes of the aggravated murder count is not relevant. *See State v. Cook*, 12th Dist. Butler Nos. CA2022-02-016 and CA2022-02-017, 2023-Ohio-256, ¶ 32 ("Motive is not an element of the crimes for which appellant was charged and the state did not have to offer proof of motive to sustain a conviction for murder, felonious assault, or having weapons while under disability."), quoting *State v. Ferguson*, 10th Dist. Franklin No. 20AP-437, 2022-Ohio-1648, ¶ 61, and *State v. Gaines*, 12th Dist. Butler No. CA99-04-082, 2000 Ohio App. LEXIS 1776, 7-8 (Apr. 17, 2000). The evidence firmly established that Harder planned to steal a large amount of cash that Powell was known to possess, so the fact that Harder may have had another motive for targeting Powell for the robbery does not impact the aggravated murder conviction.

{¶ 30} Finally, Harder claims his conviction for tampering with evidence, based on his deleting text messages in which the coconspirators planned and

communicated during the robbery of Powell, is not based on sufficient evidence, or is against the weight of the evidence. According to Harder, the state improperly relied on the coconspirator's testimony to establish his having committed the tampering-with-evidence crime. Harder acknowledges that his sole authority in support of that proposition, *State v. Pearson*, 62 Ohio St.2d 291, 291, 405 N.E.2d 296 (1980), interpreting the corroboration requirement codified under R.C. 2923.03(D) as it existed in the 1980s, has been superseded by the current version of the statute. No more need be said on this point.

{¶ 31} According to the state, the tampering-with-evidence charge was based on Harder's telling his coconspirator to delete their text messages on her phone and deleting the same on his. The coconspirator testified at trial, and the state presented evidence of a gap in communication between the two. Since Harder's claim solely focuses on the credibility of the witness, we can only review to determine whether the weight of the evidence supports that conviction. *See State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 161. Although a coconspirator's testimony may face credibility hurdles given her situation of testifying against Harder ostensibly to receive favorable treatment in her case, Harder has not demonstrated that this is the extraordinary case requiring appellate intervention. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). At trial, the state repeatedly addressed the coconspirator's credibility issues, providing a basis for her testimony with respect to the tampering-with-evidence

charge to be accepted by the trier of fact. We find no reason to deem her inherently unreliable.

{¶ 32} The final two assignments of error are overruled.

{¶ 33} Harder's convictions are affirmed, but the matter is remanded for the limited purpose of the trial court issuing a nunc pro tunc entry restating the final entry of conviction and imposing the life term of imprisonment, without the possibility of parole, upon the aggravated murder count in Case No. CR-20-653320 that was announced at the sentencing hearing.

{¶ 34} Affirmed and remanded.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for issuance of a nunc pro tunc entry and execution of sentence.

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

SEAN C. GALLAGHER, JUDGE

FRANK DANIEL CELEBREZZE, III, P.J., and
EMANUELLA D. GROVES, J., CONCUR