

[Cite as *State v. Scott*, 2004-Ohio-4631.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 83477

STATE OF OHIO, :
 :
 Plaintiff-Appellee : JOURNAL ENTRY
 :
 v. : AND
 :
 WILLIAM SCOTT, : OPINION
 :
 Defendant-Appellant :
 :

DATE OF ANNOUNCEMENT
OF DECISION: SEPTEMBER 2, 2004

CHARACTER OF PROCEEDING: Criminal Appeal from
Common Pleas Court,
Case No. CR-432768.

JUDGMENT: AFFIRMED IN PART AND
VACATED IN PART.

DATE OF JOURNALIZATION:

APPEARANCES:

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TIMOTHY E. McMONAGLE, J.:

{¶1} Defendant-appellant, William Scott, appeals his convictions associated with the murder of Douglas Rias, Jr. ("Rias") and the attempted murder of Nikon Bell ("Bell"). For the reasons that follow, we affirm in part and vacate in part.

{¶2} The record reflects that a five-count indictment was returned against appellant charging him with (1) aggravated murder, in violation of R.C. 2903.01; (2) aggravated murder while in the course of committing, or attempting to commit, aggravated robbery, in violation of R.C. 2903.01; (3) aggravated robbery, in violation of R.C. 2911.01; (4) attempted murder, in violation of R.C. 2923.02/2903.02; and (5) felonious assault, in violation of R.C. 2903.11. Each charge contained a firearm specification, as set forth in R.C. 2941.145.

{¶3} The events giving rise to the indictment occurred in the early morning hours of December 26, 2002. Late the preceding evening, Ryan Hood and his cousin, Philip Carter, went to Peabody's, a nightclub in downtown Cleveland. Shortly after their arrival, Hood observed a male wearing a leather jacket that resembled a jacket previously stolen from appellant. Hood testified that he called appellant and relayed this information, whereupon appellant drove to Peabody's to meet with Hood and Carter.

{¶4} Appellant eventually met Hood and Carter in a nearby parking lot, where the trio observed several individuals exit Peabody's, one of whom was wearing the leather jacket in question. Hood recognized these individuals as members of a group interchangeably referred to as the "Bedford Boys" or the "Red Eyes," which we will refer to as the "Bedford Boys" for ease of discussion. The Bedford Boys eventually entered one of three vehicles - a black Ford Expedition, a dark green Toyota Camry and a white Neon. The individual with the leather jacket entered the Expedition, while Rias and Bell entered the Camry. Appellant, who was seated in the rear passenger seat of Hood's car, instructed Hood to follow the three vehicles as they drove onto Interstate 77 towards Interstate 480.

{¶5} According to Hood's testimony, he lost the vehicles at some point. As he was exiting Interstate 480 at Broadway, however, he observed the Camry and Neon directly in front of him. The Neon proceeded through a traffic light, but the Camry stopped. Although Hood did not recall any comments made by appellant at this time, Carter testified that appellant stated something to the effect that appellant would get Rias's jacket if he could not get his own. Both Hood and Carter testified that as Hood's car approached the Camry, appellant instructed Hood to pull alongside the Camry, at which point appellant exited the vehicle, pulled out a nine-millimeter gun and fired several shots into the Camry, killing Rias and wounding Bell. Hood testified that appellant thereafter put

the gun to Hood's head and told him to "pull off." Hood returned appellant to his car parked near Peabody's, drove his cousin home and then drove home himself.

{¶6} Appellant disputed this version of events. Appellant's mother testified that her son was home alone watching television at the time of the murder. Appellant's co-worker, Sean Goins, testified that he spoke to appellant on the telephone at that time and that appellant was home, but with his girlfriend. Appellant's theory of the case was that Hood had a dislike for Rias stemming from their high school basketball days and that the more likely scenario was that Hood shot at the Rias vehicle while Carter drove Hood's car. Notwithstanding this version of events, Hood and Carter made statements to the Cleveland Police Department implicating appellant as the gunman after the Department received an anonymous tip. An arrest warrant, as well as a search warrant, was issued for appellant's home, which, when executed, led to the discovery of the murder weapon in the toilet bowl of a bathroom in appellant's home. Also confiscated were an Intratec .22 pistol, an SKS assault rifle and related ammunition, all of which were found in the trunk of a Cadillac parked in the garage of appellant's home.

{¶7} A jury eventually found appellant guilty as charged in the indictment and the trial court sentenced him accordingly. Appellant is now before this court and assigns three errors for our review.

I. Sufficiency of Evidence

{¶8} In his first assignment of error, appellant contends that the evidence was insufficient to convict him of aggravated robbery and that it was error, therefore, for the trial court to deny his Crim.R. 29 motion for acquittal on this charge.

{¶9} Crim.R. 29(A) governs motions for acquittal and provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction *** ." An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. A verdict will not be disturbed on appeal unless reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387. As is applicable to this case, R.C. 2911.01(A)(1) prohibits a person from "[h]aving a deadly weapon on or about the offender's person or under the offender's control and either display[ing] the weapon, brandish[ing] it, indicat[ing] that the offender possesses it, or us[ing] it" while committing, or attempting to commit, a theft offense. R.C. 2913.01(K)(1) defines "theft offense" to include a number of crimes. Pertinent to this case, however, is the attempted theft of property belonging to Rias. See R.C. 2913.02.

{¶10} Although theft requires that the accused actually obtain or exert control over the property, attempted theft has no such requirement. R.C. 2923.02(A) defines attempt broadly as "conduct that, if successful, would constitute or result in the offense." "Criminal attempt" is an act or omission constituting a substantial step in a course of conduct planned to culminate in the actor's commission of the crime but that falls short of completion of the crime. *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, at ¶101, citing *State v. Woods* (1976), 48 Ohio St.2d 127, paragraph one of the syllabus. A "substantial step" requires conduct that is "strongly corroborative of the actor's criminal purpose." *Id.*

{¶11} In this case, the state relied on Carter's testimony to the effect that appellant stated he would take Rias's jacket if he could not get his own. According to Carter, this statement was made shortly before appellant exited Hood's vehicle after pulling alongside the Rias vehicle - and after they had lost sight of the Ford Expedition, the vehicle containing the individual believed to be wearing appellant's jacket.

{¶12} Mere intent and preparation, however, do not constitute attempt. *State v. Woods*, 48 Ohio St.2d at 131. The *Woods* court noted the difficulty in differentiating between mere preparation and taking a substantial step in furtherance of an offense. "The difficulty is to formulate a standard that excludes preparations prior to an actual attempt to commit a crime, while including, as punishable, those acts which are so dangerously close

to resulting in a crime that intervention and arrest by the police are justified, even before the 'last proximate act.'

{¶13} "The application of this standard will of course depend upon both the nature of the intended crime and the facts of the particular case. A substantial step in the commission of a robbery may be quite different from that in arson, rape, or some other crime. But this standard does properly direct attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon observation of such incriminating conduct, in order to prevent the crime when the criminal intent becomes apparent." *Id.* at 131-132.

{¶14} Here, upon exiting Hood's vehicle, appellant sprayed the Rias vehicle, and its occupants, with several bullets but made no attempt to deprive Rias of any property either before or after this senseless foray. Appellant and his accomplices drove off before police arrived. It cannot be said, therefore, that the robbery would have occurred but for police intervention. It is more likely that appellant was seeking revenge in any form, but settled on inflicting fatal gunshot wounds rather than the pursuit of Rias's jacket. As such, appellant's mere words to the effect that he would take Rias's jacket did not constitute a substantial step in the commission of a theft offense so as to support a conviction for aggravated robbery. Accordingly, the trial court

erred when it denied appellant's motion for acquittal on the charge of aggravated robbery.

{¶15} Appellant's first assignment of error is well taken and is sustained. His conviction and sentence for aggravated robbery as set forth in Count Three of the indictment is hereby vacated.

{¶16} Although appellant failed to challenge his conviction for felony-murder as charged in Count Two of the indictment in this appeal, we take this opportunity to address this issue using a plain error analysis. Plain error is an obvious error or defect in the trial court proceeding that affects a substantial right. See, generally, *State v. Long* (1978), 53 Ohio St.2d 91, 94; see, also, Crim.R. 52(B). "Plain error does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62.

{¶17} Because we have already found that appellant's conviction for aggravated robbery was insupportable, neither can his conviction for felony-murder stand where aggravated robbery is the underlying offense. This is not a case where the underlying felony is subject to vacation as a separate offense but cannot be vacated for felony-murder purposes. See *State v. Stansberry* (July 5, 2001), Cuyahoga App. 78195, 2001 Ohio App. Lexis 3014 (aggravated robbery conviction vacated on statute of limitations grounds but felony-murder with aggravated robbery as the underlying

offense not subject to vacation because murder has no statute of limitations). On the contrary, there was insufficient evidence to support a conviction of aggravated robbery and, as such, a felony-murder conviction where the underlying offense is aggravated robbery similarly lacks sufficient evidence to support a conviction for that offense. Consequently, the trial court committed plain error when it denied appellant's motion for acquittal for aggravated murder while in the course of committing, or attempting to commit, aggravated robbery as charged in Count Two of the indictment. Appellant's conviction and sentence for this offense is hereby vacated.

II. Manifest Weight of Evidence

{¶18} In his second assignment of error, appellant contends that his conviction for murder is against the manifest weight of the evidence. Because we vacated appellant's felony-murder conviction as charged in Count Two of the indictment, we will confine our review to appellant's conviction for murder as charged in Count One of the indictment; namely, whether the manifest weight of the evidence supported appellant's conviction for causing the death of Rias.

{¶19} In contrast to a sufficiency-of-the-evidence argument, an argument based on manifest weight of the evidence requires an appellate court to determine whether the state appropriately carried its burden of persuasion. A court reviewing a question of weight is not required to view the evidence in a

light most favorable to the prosecution, but may consider and weigh all of the evidence produced at trial. A manifest-weight-of-the-evidence argument involves determining whether there exists a greater amount of credible evidence to support one side of an issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d at 387. It is not a question of mathematics, but depends on its effect in inducing belief. *Id.* A reviewing court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the factfinder clearly lost his or her way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. A new trial is warranted only in the exceptional case where the evidence weighs heavily against conviction. *Id.*

{¶20} This is not the exceptional case nor do we see any manifest miscarriage of justice. Both Hood and Carter testified that appellant was in Hood's vehicle with them when appellant instructed Hood to follow the caravan of cars containing the Bedford Boys. Both testified further that, upon coming up behind Rias's vehicle, appellant instructed Hood to pull alongside the Rias vehicle, at which time appellant exited Hood's vehicle and sprayed the Rias vehicle with several bullets from a weapon appellant produced.

{¶21} As was his theory of the case in the trial court, appellant argues on appeal that his evidence indicated that he was

not with Hood and Carter at the time of the murder. In particular, he relies on the testimony of his mother, who testified that appellant was at home during this time and that Hood came to her home some time in the early morning hours on the day of the murder, possibly to borrow a gun from appellant.

{¶22} This conflict in testimony, however, does not militate in favor of finding that appellant's conviction is against the manifest weight of the evidence. It is within the purview of the factfinder to believe all or part of any testimony the factfinder hears. The testimony of appellant's mother was inconsistent as to the times and presence of appellant in their home and did not comport with the testimony of appellant's other witness, Sean Goins, who testified that appellant was home with his girlfriend, while the mother testified that appellant was alone. Moreover, cellular phone records documenting several calls between appellant and Hood some time before the murder, as well as their absence during the time of the murder, supported Hood's version of events. We, therefore, cannot say that the trial court lost its way in resolving this conflicting testimony so as to create a manifest miscarriage of justice.

{¶23} Appellant's second assignment of error is not well taken and is overruled.

III. Admissibility of Evidence

{¶24} In his third assignment of error, appellant contends that the trial court erred in admitting evidence of the weapons

found in a vehicle in the garage of appellant's home, none of which were found to be used in the commission of the offenses at issue. Appellant challenges this evidence as irrelevant and, therefore, inadmissible.

{¶25} Ordinarily, a trial court has broad discretion in determining the admissibility of evidence, so long as it exercises that discretion "in line with the rules of procedure and evidence." *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271. Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Only relevant evidence is admissible under Evid.R. 402.

{¶26} We agree that evidence of the weapons retrieved from a vehicle garaged on appellant's property was improperly admitted. It was undisputed that the weapons retrieved were not involved in the offenses at issue. It is beyond our comprehension how the admission of such evidence would have any tendency to prove that appellant was responsible for the murder of Rias and attempted murder of Bell.

{¶27} Even though we find this evidence to be irrelevant, its admission by the trial court is harmless error at best. An error is harmless if it did not affect the accused's "substantial rights." Crim.R. 52(A). Otherwise stated, the accused has a constitutional guarantee to a trial free from prejudicial error,

not necessarily a trial free of all error. See *United States v. Hasting* (1983), 461 U.S. 499, 508-509. Before constitutional error can be considered harmless, however, a reviewing court must be able to "declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California* (1967), 386 U.S. 18, 24.

Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal. *State v. Lytle* (1976), 48 Ohio St.2d 391, paragraph three of the syllabus, vacated on other grounds in (1978), 438 U.S. 910.

{¶28} We do not find that the admission of this testimony contributed to appellant's conviction. Other evidence, independent of the admission of the offending irrelevant evidence, was presented that supported appellant's convictions for the murder of Rias and attempted murder/felonious assault of Bell. Because we find no prejudice by the admission of this irrelevant evidence, its admission was harmless error.

{¶29} Appellant's third assignment of error is not well taken and is overruled.

IV. Conclusion

{¶30} We affirm appellant's convictions for (1) aggravated murder, as charged in Count One of the indictment; (2) attempted aggravated murder, as charged in Count Four of the indictment; and (3) felonious assault, as charged in Count Five of the indictment. We vacate his convictions and sentences for (1) aggravated murder

while committing, or attempting to commit, aggravated robbery, as charged in Count Two of the indictment; and (2) aggravated robbery, as charged in Count Three of the indictment.

Judgment accordingly.

It is ordered that appellee and appellant equally 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 Cuyahoga County Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, in part, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence as amended herein.

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

TIMOTHY E. McMONAGLE
JUDGE

FRANK D. CELEBREZZE, JR., P.J., AND

ANTHONY O. CALABRESE, JR., J., CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for

review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).