

[Cite as *State v. Krueger*, 2010-Ohio-3725.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93742

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD KRUEGER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-496224

BEFORE: Gallagher, A.J., Rocco, J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 12, 2010

ATTORNEYS FOR APPELLANT

Robert Tobik
Chief Public Defender

BY: Erika B. Cunliffe
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Lorraine Debose
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Richard Krueger appeals his conviction for murder.

For the reasons stated herein, we affirm.

{¶ 2} On May 16, 2007, a Cuyahoga County grand jury indicted Krueger on one count of aggravated murder, in violation of R.C. 2903.01(A), with a repeat violent offender specification and one- and three-year firearm specifications, and one count of having a weapon while under disability. The case was placed on the Mental Health Docket. On June 13, 2007, Krueger

was referred to the Court Psychiatric Clinic to determine his competency to stand trial.

{¶ 3} Krueger had previously been charged with felonious assault, domestic violence, kidnapping, and abduction in Cuyahoga County Common Pleas Case No. CR-474072, against his girlfriend, Lilly Bruzas. That case was pending at the time the instant charges were brought; however, Krueger, who was diagnosed with a mental disorder and low-functioning IQ, was found incompetent to stand trial in that case.

{¶ 4} Based on a June 29, 2007 report, Krueger was found incompetent to stand trial in this case, and the trial court referred him to Northcoast Behavioral Healthcare Center for restoration. Two psychiatric evaluations were conducted, in addition to the defense-requested evaluation by an independent psychiatrist. Relying on a May 7, 2008 report, Krueger was found competent to stand trial by doctors at Northcoast Behavioral Healthcare Center; he was found competent to stand trial by an independent doctor on November 1, 2008. In December 2008, Krueger requested a sanity evaluation and was referred to the Court Psychiatric Clinic. It was determined that Krueger was sane at the time of the alleged offense and he was competent to stand trial.¹

¹ The defense had filed a motion to plead not guilty by reason of insanity, but withdrew the motion just prior to opening argument.

{¶ 5} On June 17, 2009, Krueger waived his right to a jury trial, and a bench trial commenced. The state called eight witnesses; Janet O'Brien and Steve Kotnik were introduced as eyewitnesses to the events of April 7, 2007.

{¶ 6} Krueger and the victim, Lilly Bruzas, shared a home on East 157th Street in Cleveland, Ohio.² O'Brien and Kotnik were at Krueger's home on the afternoon of April 7 with Krueger and Bruzas. O'Brien testified that she and Kotnik arrived sometime that afternoon, but Kotnik testified they arrived around 6:30 a.m. There was substantial testimony that everyone was drinking beer and doing drugs, including crack cocaine, ecstasy, and marijuana soaked in PCP, for several hours during the day. However, O'Brien's and Kotnik's testimony differed as to which of the four of them was drinking and using which particular drugs.

{¶ 7} O'Brien and Kotnik both testified there was a gun in the house that Kotnik had bought for another friend some years earlier. According to O'Brien's testimony, each of them shot the gun at walls in the house, but they could not find any bullet holes in the walls. Kotnik did not recall that occurring. There was no testimony from either O'Brien or Kotnik as to how the gun came to be at the house that day.

² Krueger and Bruzas had been involved in a personal relationship for approximately six or seven years and had a daughter together.

{¶ 8} At some point in the afternoon, Krueger started feeling ill, and he went to lie down in one of the bedrooms. He apparently started using his cell phone in the bedroom to call Bruzas on the home phone. O'Brien stated that Krueger had a history of violence toward Bruzas, particularly when he was using PCP. O'Brien became concerned as the day wore on that Krueger would become angry and violent with the more drugs he did. She testified that Krueger's behavior made her increasingly agitated and she wanted to leave the house, so she tried to convince Bruzas to leave with her and Kotnik.

{¶ 9} Both O'Brien and Kotnik testified Krueger came out of the bedroom, walked into the other bedroom, and then entered the living room holding the gun. Krueger pointed the gun at Bruzas as he approached her, saying "what did you do, bitch?" Krueger then shot Bruzas in the face as she sat on the couch. Both witnesses saw blood stream out of Bruzas's cheek.

{¶ 10} O'Brien testified that Krueger immediately went over to Bruzas and began saying "[W]hat have I done?" and that he instructed O'Brien and Kotnik to call 9-1-1. However when Kotnik tried to call for help, Krueger stopped him.

{¶ 11} O'Brien and Kotnik testified they left the house immediately thereafter and went to a nearby bar to call 9-1-1. They were told that police were already on their way. Krueger took Bruzas to Euclid Hospital in his van, where he told hospital personnel that he had arrived home and saw a

man running from the house, and Bruzas was inside with the gunshot wound to her face. The police followed Krueger back to his house. When they arrived back at Krueger's, the police arranged for a special unit to process the scene.

{¶ 12} In the house, police found a .22 caliber shell casing, evidence of recent drug and alcohol consumption, and blood on the couch. There was no sign of forced entry and no weapon. There was also blood on Krueger's sweatshirt and on a blanket in his van.

{¶ 13} Bruzas died five days after she was admitted to the hospital. The autopsy report showed a significant amount of cocaine in her system. There was also trace evidence that Bruzas was shot at point blank range from approximately one to three feet away, and the bullet had partially exited through the back of her head. The cause of death was listed as homicide from the bullet wound and resulting complications. Krueger was arrested on April 17, 2007, in Chardon, and charged with aggravated murder in connection with Bruzas's death.

{¶ 14} Krueger made a Crim.R. 29 motion at the close of the state's case and renewed the motion after the defense rested. He argued there was no evidence presented as to prior calculation and design to support a conviction for aggravated murder and that his mental incapacity prevented him from having the requisite mens rea to act with purpose. He also argued the court

should consider voluntary manslaughter or, at the very least, reckless homicide because of his mental incapacity and the testimony that he was under the influence of several drugs and alcohol at the time of Bruzas's death.

Both motions were denied.

{¶ 15} When the court delivered its verdict, it discussed at length why it did not find Krueger guilty of reckless homicide or voluntary manslaughter. It also found the state had failed to put on evidence of prior calculation and design. The court found Krueger guilty of murder, in violation of R.C. 2903.02(A), with one- and three-year firearm specifications, the repeat violent offender specification, and of having a weapon while under disability. Krueger was sentenced to 15 years to life for murder; the court merged the firearm specifications into a single three-year term to be served prior to and consecutive to the underlying term. The court sentenced Krueger to one year for the having weapon while under disability conviction, to be served concurrently. The total 18-year sentence was to be served consecutive to a one-year sentence in Case No. CR-474072, in which Krueger pleaded guilty to domestic violence and abduction.

{¶ 16} Krueger's sole assignment of error reads as follows: "Appellant was deprived of liberty without due process of law where the trial court found him guilty of murder and refused to consider whether he was instead guilty of

the lesser included or inferior offenses despite substantial evidence supporting such a verdict.”

{¶ 17} Krueger argues the court failed to consider inferior offenses and, in particular, reckless homicide or voluntary manslaughter when it convicted him of murder. He relies primarily on the fact that he has mental health issues that affect his ability to act with purpose as required under R.C. 2903.02(A), as well as the fact that the evidence showed he was highly intoxicated at the time he shot Bruzas. We are unpersuaded by these arguments.

{¶ 18} Although not phrased as a challenge to the sufficiency of the evidence, in essence Krueger argues the state failed to present sufficient evidence that he acted purposefully to cause Bruzas’s death.

{¶ 19} When an appellate court reviews a claim of insufficient evidence, “the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

{¶ 20} R.C. 2903.02(A) states that “No person shall purposely cause the death of another or the unlawful termination of another’s pregnancy.” We first address the issue of whether Krueger acted purposefully, which he argues is negated by his expression of regret and his choice to take Bruzas to the hospital.

{¶ 21} In *State v. Mathis*, Cuyahoga App. No. 91830, 2009-Ohio-3289, this court stated: “A person commits murder by purposely causing the death of another. R.C. 2903.02(A). An act is committed ‘purposely’ when it is a person’s specific intent to cause a certain result. R.C. 2901.22(A). Intent may be inferred from the circumstances surrounding the crime. Because intent dwells in the mind of the accused, an intent to act can be proven from the surrounding facts and circumstances. An intent to kill may be presumed where the natural and probable consequence of a wrongful act is to produce death, and such intent may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound. A firearm is an inherently dangerous instrumentality, the use of which is likely to produce death. (Internal citations omitted).”

{¶ 22} O’Brien’s and Kotnik’s testimony that Krueger walked toward Bruzas, said “[W]hat did you do, bitch?” and then shot her in the face from close range, provide sufficient facts and circumstances to prove intent to kill.

Krueger's use of a gun, an instrument with a tendency to destroy life and designed for that purpose, and which caused the injury leading to Bruzas's death, support a finding that he acted with purpose. It is irrelevant to the question of whether he acted purposefully that, after the shooting, Krueger expressed remorse or regret.

{¶ 23} Krueger also argues that his diminished mental capacity coupled with his drug and alcohol intoxication prevented him from acting purposefully. Under Ohio law, voluntary intoxication is not a defense to any crime. See *State v. Fox* (1981), 68 Ohio St.2d 53, 428 N.E.2d 410. However, it may be considered in determining whether the accused was capable of forming the specific intent essential to the charged crime. *State v. French* (1961), 171 Ohio St. 501, 172 N.E.2d 613, certiorari denied (1961), 366 U.S. 973, 81 S.Ct. 1941, 6 L.Ed.2d 1263. In *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443, the Ohio Supreme Court, held that "It is within the sound discretion of the trial court to determine whether the evidence presented at trial is sufficient to require a jury instruction on intoxication where the accused claims that his inebriated condition negated the mental state required as an element of the crime charged." See, also, *State v. Hipkins* (1982), 69 Ohio St.2d 80, 430 N.E.2d 943; *Mann v. Gray* (N.D. Ohio 1985), 622 F.Supp. 1225, 1232.

{¶ 24} The trial court in this case specifically acknowledged that it considered whether Krueger's intoxication prevented him from acting purposefully in the shooting death of Bruzas and found that it did not. The court also found that there was no evidence that Bruzas's intoxication or her behavior provoked Krueger to act as he did, as would suffice for a conviction for voluntary manslaughter.

{¶ 25} Furthermore, there was no evidence that Krueger's diminished mental capacity negated his intent to shoot Bruzas. Although defense counsel makes this argument on appeal, no evidence was introduced at trial about Krueger's IQ or how much education he received or the findings of his psychiatric evaluations. While it is true that this case was on the Mental Health Docket and that Krueger was originally found incompetent to stand trial, there was no evidence at trial whether or how these facts had an impact on his behavior on April 7. See, also, *State v. Wilcox* (1982), 70 Ohio St.2d 182, 436 N.E.2d 523 (Ohio Supreme Court affirmed that "partial defense of diminished capacity is not recognized in Ohio," and "defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime").

{¶ 26} We find it disingenuous for Krueger to argue that the trial court refused to consider all inferior offenses, when the record clearly shows that

the trial court addressed reckless homicide, yet found Krueger's act volitional, and voluntary manslaughter, yet found no evidence of provocation. Upon consideration of the inferior offense of murder, the trial court found, and we affirm, that while the state failed to present evidence of prior calculation and design to support aggravated murder, the state did present evidence and ultimately proved that "the purposeful killing of Lilly Bruzas no doubt was done by Mr. Krueger."

{¶ 27} We find there was sufficient evidence that Krueger acted purposefully when he shot and killed Bruzas. Krueger's sole assignment of error is overruled.

Judgment affirmed.

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 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, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
JAMES J. SWEENEY, J., CONCUR