

[Cite as *State v. Turner*, 2015-Ohio-996.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 27532

Appellee

v.

MARCUS TURNER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2013-09-2664

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 18, 2015

SCHAFFER, Judge.

{¶1} Appellant-Defendant, Marcus Turner, appeals a judgment of the Summit County Court of Common Pleas denying his Motion to Dismiss Count Two of the Indictment in this case and the specification thereto. For the following reasons, we affirm.

I.

{¶2} Akron police arrested Marcus Turner on September 13, 2013, for the shooting death of 21-year old Amandeep Singh. A grand jury subsequently indicted Mr. Turner on the following four criminal offenses: (1) aggravated murder, in violation of R.C. 2903.01(A); (2) felony murder, in violation of R.C. 2903.02(B), with felonious assault as the predicate offense; (3) felonious assault, in violation of R.C. 2903.11(A)(1),(A)(2); and (4) having weapons while under disability, in violation of R.C. 2923.13(A)(3). Counts One, Two, and Three were all accompanied by a firearm specification. Mr. Turner pleaded not guilty to all counts. The case was then tried to a jury.

{¶3} After lengthy deliberations, the jury informed the trial judge that it was deadlocked. The trial judge read the *Howard* charge to the jury and sent its members back into the jury room for further deliberation. The jury informed the trial judge roughly 90 minutes later that it was still deadlocked as to Count Two (felony murder) and Count Three (felonious assault) of the Indictment and that there was no possibility of its members reaching an agreement within a reasonable time as to either count. The jury then returned its verdict as to Count One (aggravated murder) and Count Four (having weapons while under disability) of the Indictment. The jury found Mr. Turner not guilty of aggravated murder, but guilty of having weapons while under disability. The trial judge accepted the jury's verdict.

{¶4} The State elected to retry Mr. Turner on Count Two (felony murder) and Count Three (felonious assault) of the Indictment. Prior to the retrial, Mr. Turner's defense counsel filed a motion to dismiss the felony murder count and the accompanying firearm specification arguing that a retrial on that count would be in violation of the Double Jeopardy Clause to the United States Constitution. Both parties submitted briefs on the issue and the trial judge held a hearing on the matter on September 23, 2014. At the hearing, the trial judge heard argument from both parties. The trial judge ultimately denied Mr. Turner's motion.

{¶5} Mr. Turner now brings the present interlocutory appeal raising one assignment of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS BECAUSE HE WAS ACQUITTED OF AGGRAVATED MURDER; THEREFORE, PER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION, HE CAN NOT BE TRIED A SECOND TIME FOR FELONY MURDER. [SIC.]

{¶6} In his sole assignment of error, Mr. Turner argues that the trial court erred in denying his Motion to Dismiss because the doctrine of collateral estoppel bars the State from retrying him for felony murder and the accompanying gun specification. Specifically, Mr. Turner contends that because the jury in his first trial acquitted him of aggravated murder and the accompanying firearm specification, he cannot now be retried for felony murder and the accompanying firearm specification thereto because the jury in the first case decided a critical issue of ultimate fact in his favor; that he did not cause the death of Mr. Singh. We disagree.

{¶7} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 787 (1969), states “nor shall any person be subject for the same offence or be twice put in jeopardy of life or limb[.]” Section 10, Article I of the Ohio Constitution contains a similar prohibition, which is coextensive with the federal constitutional protection. *State v. Resor*, 6th Dist. Huron No. H-08-028, 2010-Ohio-397, ¶ 11, citing *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, ¶ 14. “The [Double Jeopardy Clause] provides protection from a second prosecution for the same offense after an acquittal, protection against a second prosecution after a conviction and protection against multiple punishments for the same offense.” *Resor* at ¶ 11, citing *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

{¶8} While the Double Jeopardy Clause does not ordinarily bar a retrial following a hung jury, *Richardson v. United States*, 468 U.S. 317, 324 (1984), it does incorporate the doctrine of collateral estoppel. *State v. Lovejoy*, 79 Ohio St.3d 440, 443-444 (1997). The United States Supreme Court has stated that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in

any future lawsuit.” *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Collateral estoppel in the criminal context bars “the state * * * from relitigating an issue decided in the defendant’s favor by a valid and final judgment.” *State v. Haggard*, 9th Dist. Lorain No. 98CA007154, 1999 WL 812937, *2 (Oct. 6, 1999), quoting *State v. Zanders*, 121 Ohio App.3d 131, 134 (9th Dist.1997), citing *Ashe* at 445; see *Lovejoy* at 443-444. “Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first.” *State v. Buzanowski*, 8th Dist. Cuyahoga No. 99854, 2014-Ohio-1947, ¶ 32, citing *State v. Edwards*, 8th Dist. Cuyahoga Nos. 94568, 94929, 2011-Ohio-95, ¶ 17, quoting *Brown v. Ohio*, 432 U.S. 161, 166-167, fn. 6 (1977). Nevertheless, “a mere overlap in proof between two prosecutions does not establish a double jeopardy violation.” *In re Burton*, 160 Ohio App.3d 750, 2005-Ohio-2210, ¶ 10 (1st Dist.), citing *United States v. Felix*, 503 U.S. 378, 386 (1992).

{¶9} The United States Supreme Court has held that when a defendant has been acquitted in a prior proceeding, courts must “examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Yeager v. United States*, 557 U.S. 110, 120 (2009), quoting *Ashe* at 444 (internal quotation marks omitted); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv.L.Rev. 1, 38-39 (1960). In other words, “a reviewing court must examine the record of the previous proceeding in order to ascertain which issues were actually decided.” *In re Burton* at ¶ 12, citing *State v. Phillips*, 74 Ohio St.3d 72, 80 (1995). The defendant bears the burden of showing “that the issue whose

relitigation he seeks to foreclose was actually decided in the first proceeding.” *In re Burton* at ¶ 12, citing *Dowling v. United States*, 493 U.S. 342, 350-351 (1990).

{¶10} Here, Mr. Turner was charged and acquitted of aggravated murder in violation of R.C. 2903.01(A), which provides “[n]o person shall purposely, and with prior calculation and design, cause the death of another * * * .” “A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.” R.C. 2901.22(A). “[p]rior calculation and design indicates * * * studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim.” (Internal quotations omitted.) *State v. Patel*, 9th Dist. Summit No. 24030, 2008-Ohio-4693, ¶ 33, quoting *State v. Taylor*, 78 Ohio St.3d 15, 19 (1997).

{¶11} Mr. Turner was also charged with committing felony murder in violation of R.C. 2903.02(B). The jury, however, was hung on that count. R.C. 2903.02(B) provides:

No 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 and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

The mens rea element required to commit felony murder is the mens rea element set forth in the underlying felony offense. *State v. Horton*, 9th Dist. Summit No. 26407, 2013-Ohio-3902, ¶ 20, citing *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 43. Here, felonious assault was the predicate offense, which has a mental element of “knowingly.” *Id.*, citing R.C. 2903.11(A). “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).

{¶12} After a thorough review of the record and the charges, we conclude that Mr. Turner has failed to meet his burden of demonstrating that the jury actually decided the issue of whether he caused Mr. Singh’s death. The issue of ultimate fact that the jury had to resolve to reach an acquittal for aggravated murder was not whether Mr. Turner caused the death of Mr. Singh, but whether he caused Mr. Singh’s death purposely and with prior calculation and design. The jury could have logically concluded that the State failed to prove the mental element of “purpose[]” and “with prior calculation and design,” even though it proved that Mr. Turner caused Mr. Singh’s death. *See* R.C. 2903.01(A).

{¶13} While Mr. Turner is correct that R.C. 2903.01(A) and R.C. 2903.02(B) both require the State to prove that a defendant “cause[d] the death of another” in order secure a conviction, both statutes also require additional elements not contained in the other. Because “purpose []” and “with prior calculation and design” are not elements of felony murder as charged in this case, and because aggravated murder does not require proof of any predicate offense, aggravated murder and felony murder are not the “same offence” and there is no bar to successive prosecution. *See Resor*, 2010-Ohio-397, at ¶ 14, citing *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, ¶ 20, citing *United States v. Dixon*, 509 U.S. 688, 696 (1993).

{¶14} Therefore, Mr. Turner’s double jeopardy rights are not implicated and his acquittal of aggravated murder does not preclude a retrial on the felony murder charge and the accompanying firearm specification. The trial court did not err in denying Mr. Turner’s Motion to Dismiss.

{¶15} Mr. Turner’s sole assignment of error is overruled.

III.

{¶16} Mr. Turner's sole assignment of error is overruled, and the judgment of the Summit County Court of Common Pleas 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(C). 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.

JULIE SCHAFER
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

DONALD HICKS, Attorney at Law, for Appellant.

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