

[Cite as *State v. Martin*, 2009-Ohio-3282.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91276

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOJWAN MARTIN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490688

BEFORE: Kilbane, P.J., Stewart, J., and Jones, J.

RELEASED: July 2, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Jojwan Martin, appeals his murder conviction with a firearm specification. After a thorough review of the record and all pertinent law, we affirm.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} On January 5, 2007, a Cuyahoga County Grand Jury indicted appellant on one count of aggravated murder, in violation of R.C. 2903.01(A), with a firearm specification under R.C. 2941.145. On February 11, 2008, the case proceeded to trial before a jury. The judge instructed the jury on aggravated murder under R.C. 2903.01(A), and the lesser included offense of murder under R.C. 2903.02. The jury found appellant not guilty of aggravated murder, but guilty of murder and the firearm specification.

{¶ 4} The following testimony was elicited at trial.

{¶ 5} Joseph and Janet Oberstar testified that on November 11, 2006, at approximately 2:45 p.m., a car crashed into their home. They saw a black male in the driver's side of the vehicle (later identified as Antonio Williams). Williams was injured but still breathing. Janet spoke with the driver, while Joseph called 911.

{¶ 6} Williams had a bullet lodged in his spine, rendering him a quadriplegic. He stayed at Metrohealth Medical Center for five weeks and was then transferred

to a nursing home. The day he arrived at the nursing home, Williams died from bronchial pneumonia, a complication of quadriplegia.

{¶ 7} Dan Galita, M.D. (Dr. Galita), a forensic pathologist and Deputy Coroner from the Cuyahoga County Coroner's Office, determined that the bullet entered the left side of Williams' s neck and traveled through his cervical spine. Dr. Galita determined that the gunshot wound ultimately caused the bronchial pneumonia that resulted in Williams's death.

{¶ 8} Two witnesses later came forward identifying appellant as the shooter. Earwin Watters testified that, on the day of the shooting, he went into Papi's, a store on the corner of East 71st and Hecker Avenue. As he walked into Papi's, he noticed appellant talking to a man in a vehicle on the opposite side of the street. When Watters was inside the store, he heard screeching tires and a gunshot. He looked out the glass door of the store and saw appellant on foot chasing after the car. Watters ran in the opposite direction and heard two more gunshots.

{¶ 9} Debby Crayton lived on East 71st Street. She had known appellant for several years. Crayton heard gunshots while she was in her bathroom. She looked out the window and saw appellant running down Hecker Street with a gun in his hand, yelling "that's what you do for motha f***." (Tr. 754.) A few moments later she saw appellant's car speed away.

{¶ 10} Sergeant Nate Willson of the Cleveland Police Department testified that because the bullet recovered from Williams's body had been damaged, it therefore could not be matched to the recovered firearm. The sergeant compared the shell casing found on Hecker Avenue with the gun found on appellant and determined it to be a match.

{¶ 11} Appellant has presented five assignments of error for our review.

{¶ 12} ASSIGNMENT OF ERROR NUMBER ONE

“THE TRIAL COURT ABUSED ITS DISCRETION AND DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY DENYING APPELLANT’S REQUEST FOR A JURY INSTRUCTION ON INVOLUNTARY MANSLAUGHTER.”

{¶ 13} Appellant argues the trial court abused its discretion when it denied his request for an instruction on involuntary manslaughter. Based on a review of the record and pertinent law, we disagree.

{¶ 14} Appellant was charged with one count of aggravated murder pursuant to R.C. 2903.01. The trial judge provided the jury with the option to consider the lesser included offense of murder pursuant to R.C. 2903.02. Appellant requested the jury also be instructed on the lesser included offense of involuntary manslaughter. The trial court denied the request.

{¶ 15} It is in a trial court's discretion to allow a jury instruction on a lesser included offense. *State v. Mitchell* (1988), 53 Ohio App.3d 117, 559 N.E.2d 1370.

Absent a showing that the trial court abused its discretion, we will defer to the trial court's judgment. *Id.* For a court to have abused its discretion, it must be "more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 16} It is not disputed that involuntary manslaughter is a lesser included offense of aggravated murder. *State v. Thomas* (1988), 40 Ohio St.3d 213, 215, 533 N.E.2d 286; R.C. 2903.01(A). In order for the trial court to provide a charge on a lesser included offense, there must be evidence presented during trial that would not only support an acquittal on the initial crime, but also support a conviction on the lesser included offense. *Id.* at 216. When there is isolated evidence presented of the lesser offense, a trial judge is not required to provide such an instruction. *State v. Shane* (1992), 63 Ohio St.3d 630, 633, 590 N.E.2d 272. Requiring the court to provide instructions on lesser offenses any time there is any evidence whatsoever to support it, would require the judge to give such lesser included instructions in nearly every case. *Id.*

{¶ 17} The charges of aggravated murder and murder require the defendant to purposely cause the death of another. R.C. 2903.01; R.C. 2903.02; *State v. Lynch*, Cuyahoga App. No. 84637, 2005-Ohio-3392. Involuntary manslaughter simply requires recklessness. R.C. 2903.04.

{¶ 18} The state relies on *State v. Clark*, Cuyahoga App. No. 89371, 2008-Ohio-1404, a factually similar case where the defendant claimed the trial court erred in not providing an instruction on involuntary manslaughter. Clark became involved in a physical altercation with the victim inside a store. Clark shot the victim three times, and the struggle continued outside the store.

{¶ 19} The court determined that it was unreasonable to conclude Clark was merely reckless. *Id.* at _42. Clark shot the victim three times and was obviously involved in a fight with the victim at the time of the shooting. *Id.* at _11. Similarly, in this case, appellant was seen standing next to the victim's car moments before the shooting. Appellant then chased after the vehicle firing three shots directly at the driver. The state presented sufficient evidence to conclude the crime was purposeful.

{¶ 20} Finding no merit to this argument, assignment of error one is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

“THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION.”

{¶ 21} Appellant argues the evidence presented at trial was insufficient to support his conviction. Specifically, he argues that there was no evidence that he acted purposefully, and there was no evidence to support that the victim's gunshot wound was the proximate cause of death. For the following reasons, we disagree.

{¶ 22} The Ohio Supreme Court outlined the standard for reviewing sufficiency of the evidence when it stated:

“An appellate court’s function when 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. The relevant inquiry is whether, after viewing the evidence in the 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 23} Appellant was charged with one count of aggravated murder, and the jury was instructed on the lesser included offense of murder. Both offenses require purposeful intent. Circumstantial evidence can be used to demonstrate intent. *State v. Carter*, Cuyahoga App. No. 87705, 2006-Ohio-6427. When determining intent this court has previously held:

“Those surrounding facts and circumstances include the nature of the instrument used, its tendency to end life if designed for that purpose, and the manner in which any wounds were inflicted. A jury can infer intent to kill by the defendant’s use of a firearm, an inherently dangerous instrumentality, the use of which is likely to produce death.” *State v. Mackey* (Dec. 9, 1999), Cuyahoga App. No. 75300.

{¶ 24} When reviewing the facts of this case, we conclude there was sufficient evidence that appellant acted purposefully. Appellant chased after the car and discharged a deadly firearm into the driver’s side of a moving vehicle. Appellant fired a total of three shots, continuously pursuing the vehicle. It is clear, when

reviewing the evidence in the light most favorable to the prosecution that a rational juror could have found the appellant's conduct to be purposeful.

{¶ 25} Appellant also argues that the verdict is not supported by sufficient evidence because the state failed to prove the correlation between the gunshot wound and the victim's death from pneumonia. We disagree.

{¶ 26} Dr. Galita specifically testified as to the cause of death. The victim's gunshot wound through the neck rendered him quadriplegic, which resulted in bronchial pneumonia and then death. The victim survived for approximately five weeks after the shooting until eventually succumbing to pneumonia.

{¶ 27} Appellant argues that the victim had emphysema, which may have been the cause of his death. However, Dr. Galita expressed the opinion that the gunshot wound, and not emphysema, was the cause of the pneumonia. Appellant had the opportunity to cross-examine Dr. Galita on this issue.

{¶ 28} In factually similar cases, this court concluded the testimony of a deputy coroner regarding cause of death is sufficient. *State v. Sellers*, Cuyahoga App. No. 88535, 2008-Ohio-4681, _39. In *State v. Sellers*, the defendant was charged with involuntary manslaughter. The victim was severely beaten and after being in a vegetative state for several years, eventually died from pneumonia. *Id.* at _6.

{¶ 29} Sellers argued sufficient evidence was not presented to support the proximate cause of the victim's death. The only witness presented by the State testifying as to the cause of death was a deputy coroner, who testified that the victim died from acute bronchopneumonia resulting from the earlier assault. *Id.* at _5. In *Sellers*, this court concluded that because the deputy coroner testified that the injuries inflicted by the defendant were the cause of death, and not merely a possible cause, such testimony was sufficient to proximate cause. *Id.* at _39.

{¶ 30} In the instant case, Dr. Galita specifically testified that the victim died from pneumonia that resulted from the gunshot wound. The state is not required to provide any further evidence to support causation. Finding the state presented sufficient evidence to demonstrate causation, this assignment of error is overruled.

{¶ 31} ASSIGNMENT OF ERROR NUMBER THREE

“THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 32} Appellant argues his conviction was not supported by reliable evidence.

We disagree.

{¶ 33} When a court determines a conviction is supported by sufficient evidence, it may still determine the conviction to be against the weight of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. “The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.* at 387, quoting *State v.*

Martin (1983), 20 Ohio App.3d 172, 175. When assessing weight of the evidence, the court must look to

“[t]he inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them.” *Id.* at 387, quoting *Black’s Law Dictionary* (6 Ed.1990) at 1594. (Emphasis in original.)

{¶ 34} Appellant argues that the two eye-witnesses who identified him as the shooter lacked credibility. Watters testified that his federal sentence may be decreased by approximately 30 months based upon his testimony in this case. Appellant argues Watters only revealed information regarding the shooting when he was arrested on federal charges and had something to gain. However, Watters only provided this information when he was approached and specifically questioned. Watters had known appellant for seven years and identified him in a photo array. Watters explained that he did not come forward when the incident happened because he did not want to become involved.

{¶ 35} While it is true that Watters may receive a reduced federal sentence based upon his testimony, Watters had not been guaranteed anything for his testimony. Further, the jury heard the testimony regarding the possible deal, and it was not unreasonable for them to believe Watter’s testimony in spite of this. Watters was able to provide the jury with a detailed account of the incident.

{¶ 36} Appellant also points out several inconsistencies in Crayton's testimony. Crayton told police that she saw appellant carrying a chrome gun; however, appellant's gun was not chrome. Crayton first stated she heard three gunshots, then stated she only heard two gunshots. Finally, it was not until her testimony at trial that she revealed appellant had yelled "that's what you do for motha f***," as he ran from the scene. (Tr. 754.)

{¶ 37} While there were some inconsistencies in Crayton's statements, it is not unreasonable for the jury to have believed her. She witnessed the shooting from her window. She knew appellant and immediately recognized him as the shooter. Crayton's testimony corroborated that given by Watters. Both witnesses identified the shooter as appellant and gave a detailed description of his clothing. Crayton saw appellant run from the scene and then moments later saw his car drive by. She later identified appellant when a detective visited her home; however, she was reluctant to provide a name because she was scared and did not want to become involved.

{¶ 38} Appellant contends the bullet hole in the rear window of the car demonstrates that he was firing the gun recklessly, and not aiming directly at the victim. This is an argument for sufficiency of the evidence, however, it is inconsequential. The mere fact that the bullet entered through the back window rather than the front does not indicate appellant did not act purposefully.

Appellant aimed the gun at the driver's side of the vehicle, and the bullet did in fact hit the driver.

{¶ 39} Lastly, appellant argues that the state did not introduce medical records documenting the victim's medical treatment, therefore, the evidence failed to support the state's conclusion that the victim died from the gunshot wound. This argument lacks merit.

{¶ 40} This argument also addresses the sufficiency of the evidence and not manifest weight; however, the state presented Dr. Galita who specifically testified as to the cause of death. Dr. Galita explained that the victim had been rendered a quadriplegic. Consequently, the victim's lungs had difficulty expanding, resulting in the accumulation of bacteria and eventually pneumonia. Appellant argues the victim may have died from emphysema. However, no evidence was presented by the appellant to support this theory. The only evidence presented regarding cause of death was the testimony of Dr. Galita from the coroner's office who determined the gunshot wound resulted in the victim's death.

{¶ 41} Finding that the jury did not lose its way and that the verdict was supported by substantial evidence, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

“THE TRIAL COURT ERRED IN IMPOSING A FINE AND COURT COSTS WITHOUT INQUIRY INTO APPELLANT’S FINANCIAL CONDITION.”

{¶ 42} Appellant argues the court did not consider his ability to pay as required by R.C. 2929.19(B)(6) when imposing a \$20,000 fine at his sentencing hearing. For the following reasons, we disagree.

{¶ 43} It should be noted that appellant did not object when the fine was rendered against him. (Tr. 1046-47.) As appellant failed to object, the court must review the record for plain error. *State v. Marbury* (1995), 104 Ohio App.3d 179, 181, 661 N.E.2d 271.

{¶ 44} Normally, “an appellate court should not consider questions which have not been properly raised in the trial court and upon which the trial court has had no opportunity to pass. The plain error rule should be applied with caution and should be invoked only to avoid a clear miscarriage of justice.” *State v. Long* (1978), 53 Ohio St.2d 91, 95-96, 372 N.E.2d 804.

{¶ 45} Appellant was convicted of a first degree felony, which carries a discretionary fine of up to \$20,000, pursuant to R.C. 2929.18(A)(3)(a). Although the trial court is required to consider a defendant’s ability to pay, the court is not required to hold a hearing or indicate that it considered such in its judgment entry. *State v. Horsey*, Cuyahoga App. No. 89864, 2008-Ohio-4447, citing *State v. Cosme*,

Cuyahoga App. No. 90075, 2008-Ohio-2811. However, there must be some evidence in the record that the court did so.

{¶ 46} Appellant argues that because he was found to be indigent, the court must not have considered ability to pay or the maximum fine would not have been imposed. However, a review of the record indicates the trial judge spoke at length before sentencing appellant. The trial judge heard from the victim's family, and read through a detailed account of appellant's previous criminal history. The court was also well aware that the defendant was indigent when she imposed the fine as the record reflects appellant was appointed appellate counsel at that time.

{¶ 47} We conclude that there is sufficient indication from the record that the court considered ability to pay when imposing the fine. Accordingly, this assignment of error is overruled.

{¶ 48} ASSIGNMENT OF ERROR NUMBER FIVE

“THE PROSECUTOR COMMITTED MISCONDUCT IN HIS CLOSING STATEMENT IN VIOLATION OF APPELLANT’S DUE PROCESS RIGHTS AND RIGHT TO A FAIR TRIAL.”

{¶ 49} Appellant argues the prosecutor committed misconduct during the closing arguments at trial when he misstated evidence and attempted to shift the burden of proof. Based on a review of the record, we find no evidence of misconduct.

{¶ 50} When reviewing whether the statements prejudiced the defendant, the court must review the entire record. *State v. Frazier*, 115 Ohio St.3d 139, 2007-

Ohio-5048 at _170. “It must be clear beyond a reasonable doubt that, absent the prosecutor’s comments, the jury would have found defendant guilty.” *State v. Smith* (1984), 14 Ohio St.3d 13.

{¶ 51} Appellant contends that the prosecutorial misconduct occurred during closing arguments. During closing arguments, parties may comment on the evidence presented, as well as the inferences which can be drawn from the evidence. *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶ 52} Appellant first argues that, in closing arguments, the prosecutor misstated the evidence and stated that Detective Willson identified the bullet removed from the victim had been fired from the firearm recovered from appellant. A review of the transcript reveals that the prosecutor never addressed the bullet recovered from the victim in his closing argument. The fatal bullet was identified as Exhibit 28.

{¶ 53} The prosecutor specifically stated, “[n]ow, that gun, Exhibit 39, and Exhibit 33 were compared by Nate Willson. And he testified to you that Exhibit 39 fired the bullet that was exhibit–” (Tr. 974.) At that point appellant objected and the prosecutor never finished his sentence. The statements made by the prosecutor were accurate. It is unclear whether the prosecutor was about to make a statement regarding the fatal bullet; however, defense counsel interrupted the prosecutor before he could finish his statement. The prosecutor did argue that the shell casing

found on Hecker Avenue was indeed from appellant's gun, but that testimony was specifically elicited at trial.

{¶ 54} Secondly, appellant argues that the prosecutor committed misconduct by attempting to shift the burden of proof regarding the cause of death to the defense. Specifically, the prosecutor stated “[t]here is no independent medical examiner’s testimony to contradict the findings of the county coroner about the cause of death–.” (Tr. 1005.)

{¶ 55} There was no comment regarding the burden of proof in this statement. Further, this statement was made during rebuttal, after the defense had argued the jury should not rely on the deputy coroner’s testimony to determine the cause of death. The prosecutor has the right to respond in rebuttal to statements made by the defendant during closing arguments. *State v. Diar*, 120 Ohio St.3d 460, 487 2008-Ohio-6266.

{¶ 56} Even if we were to conclude the prosecution made inappropriate statements during closing arguments, any such statements would be harmless in light of the overwhelming evidence against the appellant. Two eye-witnesses identified the appellant as the shooter, and the shell casing found at the scene was identified as being fired from the gun recovered from appellant three weeks after the shooting.

{¶ 57} We conclude this assignment of error is without merit and 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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
LARRY A. JONES, J., CONCUR