[Cite as *State v. Mathis*, 2009-Ohio-3289.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91830

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PRESTON MATHIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507908

BEFORE: Stewart, J., McMonagle, P.J., and Dyke, 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).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Preston Mathis, appeals from guilty verdicts on counts of murder and having a weapon under disability. The charges arose after he admittedly shot another man during a fight. Challenging the sufficiency and weight of the evidence, Mathis contends that the shooting was accidental and that the state failed to offer proof that he purposely intended to kill the victim. He also complains that the court abused its discretion by denying his request for a jury instruction on lesser included offenses. We find no error and affirm.

I

{¶ 2} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1981), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 3} 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." *State v. Herring*, 94 Ohio St.3d 246, 266, 2002-Ohio-796. Because intent dwells in the mind of the accused, an intent to act can be proven from the surrounding facts and circumstances. *State v.*

Treesh, 90 Ohio St.3d 460, 484-485, 2001-Ohio-4. "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." *State v. Robinson* (1954), 161 Ohio St. 213, paragraph five of the syllabus. "A firearm is an inherently dangerous instrumentality, the use of which is likely to produce death." *State v. Seiber* (1990), 56 Ohio St.3d 4, 14.

{¶ 4} Testimony by the state's witnesses showed that the victim had been with a group of people who left a party. Among these people was a man named George Little. Little and the victim began arguing, and the argument turned into a physical fight. The victim won the fight and Little left. Little returned by car about 20 minutes later with Mathis and another man. Mathis had a gun hanging out from his pants. One of the men asked the victim why he "jumped" Little. Little swung at the victim. As the victim began to fight back, Mathis stepped around two other people, said the word "bitch," pointed the gun at the victim and shot.

{¶ 5} The bullet struck the victim in the left eye. The presence of stippling on the victim indicated that the gun had been only six to 18 inches from the victim's eye at the time it was fired.

{¶ 6} Viewing this evidence in a light most favorable to the state establishes the essential elements of murder. By his own admission, Mathis carried a firearm, an inherently dangerous instrumentality. He accompanied Little in order to settle a score with the victim. As Little and the victim began fighting anew, Mathis pointed the gun at the victim and, calling him a name, fired from very close range. By pointing the gun and firing from such close range, the jury was entitled to presume that Mathis intended to kill the victim. He not only used an instrumentality that could cause death, his use of the word "bitch" indicated an animosity toward the victim that negated any claim that Mathis accidentally discharged the gun.

II

{¶ 7} Mathis next argues that the murder verdict is against the manifest weight of the evidence. In doing so, he challenges the character of the eyewitness who saw him holding a gun, claiming that inconsistencies in the eyewitnesses' testimony made them inherently unbelievable.

{¶ 8} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 340. The use of the

word "manifest" means that the trier of fact's decision must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 9} The jury did not lose its way in finding Mathis guilty of murder. Although there were inconsistencies in one witness's testimony as to the exact number of gunshots fired (he said three, while other witnesses heard just one shot), this inconsistency was so immaterial that it did not taint the rest of his testimony. Testimony by other witnesses remained consistent on all main points, and Mathis himself conceded that he held the gun at the time it discharged. And it was another witness who heard Mathis utter the word "bitch" just before the gun discharged. Mathis's possession of the gun, the heated exchange of words leading to the second fight, Mathis's utterance of the word "bitch" as the gun discharged, and Mathis's close proximity to the victim was evidence of such character that could convince a trier of fact that Mathis intended to shoot the victim.

{¶ 10} Mathis claimed that the gun accidentally discharged. He said that he arrived at Little's house and noticed swelling on Little's head. As he, Little,

and a third man left, Mathis noticed that Little carried a gun. They were driving when they saw the victim. When Little and the victim began to confront each other, Mathis asked Little to give him the gun. Mathis held the gun in his gloved hand and tried to keep it out of view. One of the others saw the gun, so Mathis turned away and tried to put the gun in his coat pocket. At that point, the victim rushed Little and Mathis jumped. The gun discharged.

{¶ 11} The jury was free to disbelieve Mathis's testimony that the gun accidentally discharged. He knew that Little had been in a fight with the victim, and he knew that when the car stopped, there would likely be another confrontation. He not only took hold of the gun, but he held it no more than 18 inches from the victim's face when it discharged. The jury could reasonably decide that the state's witnesses were more credible and Mathis intended to shoot the victim.

III

{¶ 12} Finally, Mathis argues that the court abused its discretion by denying his requests for jury instructions on the offenses of negligent homicide and involuntary manslaughter.

A

{¶ 13} An instruction on a lesser included offense is required "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v.*

Thomas (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. An instruction is not warranted simply because the defendant offers "some evidence" going to the lesser included offense – otherwise, the judge would never be able to refuse to give an instruction on a lesser included offense. S*tate v. Shane* (1992), 63 Ohio St.3d 630, 633. We review the court's decision on requested jury instructions for an abuse of discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

B

{¶ 14} A person commits negligent homicide by negligently causing the death of another by means of a deadly weapon or dangerous ordnance. See R.C. 2903.05. A person can murder another; that is, purposely cause the death of another, by means other than by a deadly weapon or dangerous ordnance. See *State v. Koss* (1990), 49 Ohio St.3d 213, 219. Consequently, negligent homicide is not a lesser included offense of murder. Id. at paragraph four of the syllabus. The court did not abuse its discretion by denying Mathis's request for a jury instruction on negligent homicide. *State v. Talley*, Cuyahoga App. No. 83237, 2004-Ohio-2846, ¶69.

{¶ 15} Moreover, because Mathis presented a defense based on mistake, he negated an element of intent or criminal culpability. In *State v. Samuels* (Sept. 24, 1987), Cuyahoga App. No. 52527, we considered this issue and stated: "The defense of accident is totally inconsistent with a request for a jury instruction

with regard to involuntary manslaughter or negligent homicide in that each of these offenses possess the element of intent and/or criminal culpability." Accord *State v. Wiley*, Franklin App. No. 03AP-340, 2004-Ohio-1008, ¶34; *State v. Glagola*, Stark App. No. 2003CA00006, 2003-Ohio-6018, at ¶21-23.

C

{¶ 16} A person commits involuntary manslaughter by causing the death of another as a proximate result of the offender's committing or attempting to commit a felony. See R.C. 2903.04(A). Involuntary manslaughter is a lesser included offense of murder. *State v. Lynch*, 98 Ohio St.3d 514, 526, 2003-Ohio-2284.

{¶ 17} As previously noted, an accident defense is incompatible with a request for a lesser included offense instruction on involuntary manslaughter. *Samuels*, supra. See, also, *State v. Irwin*, Hocking App. Nos. 03CA13 and 04CA14, 2004-Ohio-1129, ¶32-33 (counsel not ineffective for failing to seek instruction on involuntary manslaughter because instruction would have negated accident defense). Mathis could not consistently maintain an accident defense while at the same time maintaining that he acted with purpose to commit an underlying felony, so the court did not err by refusing to instruct the jury on involuntary manslaughter.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
ANN DYKE, J., CONCUR