

[Cite as *State v. Smiley*, 2010-Ohio-4002.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93565

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

IYSHIA SMILEY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514501

BEFORE: Celebrezze, J., Stewart, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: August 26, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Iyshia Smiley, appeals her conviction for murder. Based on our review of the record and pertinent case law, we affirm.

{¶ 2} On July 18, 2008, appellant contacted a friend, Saudia Craig, and asked her to help appellant's younger sister, Olivia "Danielle" Tyson, prepare for a beauty pageant. Appellant picked up Craig, another individual named Brittany King, and King's one-year-old son. The individuals returned to appellant's mother's home, where Craig and King began fixing Tyson's hair.

Later that day, appellant and King left and picked up appellant's boyfriend, Darrell Hitt, from work. According to the trial testimony of Craig and King, appellant and Hitt began consuming alcoholic beverages once they returned to appellant's mother's home. At some point, Craig realized she did not have all the necessary supplies, and the group decided to go to Craig's apartment to complete Tyson's beauty make-over.

{¶ 3} Once at Craig's apartment, appellant and Hitt continued to consume alcoholic beverages. Craig testified that the two began arguing and then informed her they were leaving to go to the store. Craig testified that Hitt returned approximately ten minutes later and told her that he and appellant were arguing and fighting and appellant was still downstairs. Craig went outside and called appellant's name, but appellant was walking away from the apartment and would not respond to Craig.¹

{¶ 4} According to Craig, once appellant finally returned to the apartment, Hitt was sitting on the couch. Appellant approached Hitt and demanded he return her car keys. When he refused, the couple began "tussling and fighting." During this physical altercation, appellant and Hitt knocked over a movie rack and a container of change that was in Craig's

¹According to appellant, the two did not begin fighting until they returned from their trip to the store. Appellant testified that Hitt was driving her vehicle and almost hit something when pulling back into Craig's parking lot. Appellant then demanded that Hitt return her car keys and he refused. According to appellant, the two began arguing and Hitt smacked the sandwich she was eating out of her hand.

living room. At this point, King, who was also in the living room, picked up her son and went into a different room. Tyson accompanied King into that room and the two shut the door. When the couple knocked over the movie rack, Craig asked them to leave. According to Craig, Hitt then sat down on the couch and appellant walked into the kitchen.

{¶ 5} Craig testified that appellant returned from the kitchen with a knife in her hand, the two continued arguing, and Hitt told appellant to stab him. When appellant attempted to stab Hitt, he grabbed Craig and put her in front of him as a human shield. Appellant kept trying to reach around Craig to stab Hitt. Craig began choking appellant and was eventually able to get the knife away from her. Craig then attempted to break the knife on the wall while appellant was trying to grab the knife away from her.

{¶ 6} According to Craig, Hitt was lying on the ground at this time. Appellant went over to him, began going through his pockets, and indicated that he would be fine. As Craig was calling 911, appellant went into the kitchen and got another knife. King, who had come out of the other room by this point, took the second knife from appellant. King and Craig then took all of the knives out of the kitchen and hid them in a barbeque grill on Craig's back porch.

{¶ 7} Craig testified that appellant then told her that she was going to leave. After Craig told appellant that she could not leave because the police

were on their way, appellant agreed to stay and began conducting CPR on Hitt.

{¶ 8} King testified that while she and Tyson were in the other room with the door closed, she could hear appellant and Hitt arguing. She did not leave the room until she heard Craig screaming. King testified that she opened the door and saw appellant stab Hitt. She then saw Craig take the knife from appellant and call 911. King then saw appellant go into the kitchen and get another knife. King corroborated Craig's story that King took the knife from appellant and then she and Craig hid the knives in a grill on Craig's back porch.

{¶ 9} Officer Richard Thevenin with the Cleveland Police Department also testified on behalf of the state. Officer Thevenin responded to Craig's address due to a report that a man had been stabbed. According to Officer Thevenin, appellant opened the door and immediately admitted to stabbing her boyfriend. Officer Thevenin sat her down, located the weapon, placed it on the television set, and read appellant her Miranda rights. After admitting that she understood her rights, appellant told Officer Thevenin that she and Hitt were arguing and she wanted to leave. After Hitt would not leave her alone, she retrieved a knife from the kitchen and stabbed him.

{¶ 10} Tyson testified on appellant's behalf. According to Tyson, she saw Hitt choking appellant at one point during the day, but chose not to

disclose this information to the police when she was originally questioned. Tyson also testified that she and King were in the other room with the door closed and could hear appellant and Hitt arguing. According to Tyson, it was not until Craig yelled for someone to call 911 that she and King opened the door. Tyson testified that she saw Hitt holding his wounds and falling to the ground; then appellant attempted to administer CPR. Tyson further testified that she did not see appellant consume any alcoholic beverages on the day in question, she did not see appellant attempt to leave after stabbing Hitt, and she did not hear anyone tell appellant that she had to stay at the scene until the police arrived.

{¶ 11} Appellant testified on her own behalf. According to her testimony, she and Hitt were arguing because he refused to return her car keys and, at one point, Hitt kned her in the abdomen. The two began arguing. Hitt managed to get appellant on the ground and was choking her. After Craig pulled Hitt off of appellant, appellant retreated to the kitchen. According to appellant, Hitt followed her into the kitchen. Fearing for her safety, she grabbed the knife. Appellant then testified that once she grabbed the knife, she blacked out and does not remember what occurred from the time she retrieved the knife until Craig was taking the knife from her. She also testified that she never went into the kitchen to get another knife and

did not attempt to leave Craig's apartment before the police arrived. Hitt was transported to the hospital where he was pronounced dead.

{¶ 12} Appellant was indicted on two counts of murder, one in violation of R.C. 2903.02(A) and one in violation of R.C. 2903.02(B). At the close of the evidence, the trial court granted appellant's request for instructions on voluntarily manslaughter as well as the affirmative defense of self-defense. The jury found appellant guilty of both counts of murder, which were implicitly merged, and she was sentenced to 15 years to life in prison. This appeal followed wherein appellant argues her conviction was against the manifest weight of the evidence and she was denied the effective assistance of trial counsel.

Law and Analysis

Manifest Weight

{¶ 13} When determining whether a conviction is against the manifest weight of the evidence, an appellate court reviews the entire record, “weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury 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. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. According to appellant, the jury lost its way. She argues that the jury should have found that she acted in self-defense or, at the very least, that she was guilty of voluntary manslaughter.

{¶ 14} The jury found that appellant committed two counts of murder. R.C. 2903.02(A) prohibits an individual from purposely causing 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).

{¶ 15} Craig’s testimony indicated that appellant and Hitt were arguing over appellant’s car keys when appellant became physically violent. Craig

testified that Hitt only attempted to physically restrain appellant and did not hit her back. At some point during the confrontation, appellant went into the kitchen, grabbed a knife, and stabbed Hitt. After Craig took the knife from appellant, appellant attempted to retrieve another knife.

{¶ 16} King's testimony did not differ in any significant fashion from Craig's. King testified that she heard screaming and emerged from another room to see appellant stab Hitt. According to King, once Craig grabbed the knife away from appellant, appellant went into the kitchen to grab another. King was able to get the second knife away from appellant and then hid the remaining knives in a grill on Craig's back porch. Appellant also admitted to Officer Thevenin that she stabbed her boyfriend and admitted at trial that she stabbed an unarmed man over a set of car keys.

{¶ 17} The testimony of Craig and King, which was obviously believed by the jury, was enough to find that appellant intentionally stabbed Hitt. Even if appellant did not intend to kill Hitt, her actions were prohibited by law, and thus she acted purposefully. The jury did not lose its way in finding her guilty of murder in violation of R.C. 2903.02(A).

{¶ 18} "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." R.C. 2903.02(B). The

evidence presented at trial showed that appellant retrieved a knife and stabbed Hitt twice. This evidence, if believed by the jury, established that she caused serious physical harm to another by use of a deadly weapon. As such, she engaged in activity that would have constituted felonious assault, which is an offense of violence and is ordinarily a second-degree felony. R.C. 2903.11(D)(1)(a). Accordingly, the jury did not lose its way in finding appellant guilty of murder in violation of R.C. 2903.02(B).

{¶ 19} Appellant argues that she acted in self-defense or that she could only be convicted of voluntary manslaughter. “We note initially that under Ohio law self-defense is an affirmative defense and defendant bears the burden of establishing by a preponderance of the evidence a claim of self-defense. The defendant also must establish by a preponderance of the evidence the mitigating circumstances of the inferior crime of voluntary manslaughter in a prosecution for murder or aggravated murder.” (Internal citations omitted.) *State v. Williams* (Oct. 22, 1992), Cuyahoga App. No. 61080.

{¶ 20} The record demonstrates that the jury rejected appellant’s self-defense argument. The evidence presented supports the jury’s conclusion. While appellant and Tyson, her sister, testified that Hitt choked appellant, this testimony was controverted by the testimony of King and Craig, who both said that appellant was the only individual being physically violent as

the events transpired. Whether to believe appellant's self-serving testimony was up to the jury. We see no conflicts or discrepancies in the record that indicate the jury lost its way in finding appellant guilty of murder. There was no miscarriage of justice, appellant's conviction is not against the manifest weight of the evidence, and her first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 21} In her second assignment of error, appellant argues that “defense counsel was ineffective in failing to object to any of the 29 photographs that were entered into evidence against his client.” In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 22} In arguing that defense counsel was ineffective for failing to object to the various photographs admitted at trial, appellant relies on *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768. This reliance is misguided. In *Maurer*, the Court held that whether to admit photographs at trial is within the discretion of the trial judge, and a court may refuse to admit an inflammatory photograph if the danger of prejudice outweighs the photograph's probative

value. *Id.* at 264-265. The court went on to hold that “the mere fact that a photograph is gruesome or horrendous is not sufficient to render it per se inadmissible.” *Id.* at 265.

{¶ 23} Appellant relies on *Maurer* to argue that “[a]ll pictures were repetitive and highly prejudicial to [appellant] as they showed the blood on the floor/wall and the condition of the victim.” Although some of the photographs did show blood at the crime scene, they were hardly so prejudicial as to affect the outcome of appellant’s trial. A review of the transcript shows that these photos were used predominantly to show where all parties were as the events transpired. As such, we cannot find that their prejudicial nature outweighed their probative value or that the photographs should not have been admitted.

{¶ 24} Assuming, arguendo, that the photographs were inadmissible, appellant has failed to show that the jury would have reached a different conclusion had these photographs been excluded. The testimony of King and Craig unequivocally showed that appellant retrieved a knife and purposefully stabbed Hitt. This testimony was enough to find appellant guilty of murder, especially in light of appellant’s confession to Officer Thevenin. Because the photographs were admissible and appellant has failed to show that the jury would have found her not guilty of murder had the photographs been excluded, we cannot find that her trial counsel was ineffective. Appellant’s second assignment of error is overruled.

Conclusion

{¶ 25} The evidence at trial showed that appellant and Hitt were arguing over a set of car keys when appellant retrieved a knife and stabbed Hitt twice. Appellant's claims of self-defense were obviously rejected by the jury, which exercised its sound discretion and found appellant guilty of murder. We see no discrepancies or conflicts in the evidence to suggest that appellant's conviction is against the manifest weight of the evidence. Also, the photographs admitted at trial, while repetitive, were not so prejudicial as to outweigh their probative value. In addition, appellant failed to show how the trial's outcome would have been different had her trial counsel objected to the admission of the photographs. We cannot find that appellant's conviction was against the manifest weight of the evidence or that her trial counsel was ineffective. Both of appellant's assignments of error are 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
ANN DYKE, J., CONCUR