

[Cite as *State v. Thomas*, 2010-Ohio-5237.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94042

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID T. THOMAS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520343

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

RELEASED AND JOURNALIZED: October 28, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant David Thomas appeals his convictions for reckless homicide, tampering with evidence, and having a weapon while under disability. For the reasons set forth herein, we affirm.

{¶ 2} On January 30, 2009, Thomas was indicted on three counts: aggravated murder, tampering with evidence, and having a weapon while under disability. On June 30, 2009, the matter proceeded to a jury trial. Three of the state's witnesses, Nicole Hart, Darryl Hart, and Farah Curry, were eyewitnesses to the events of December 21, 2008, when Thomas shot and killed the victim, Richard Pursley.

{¶ 3} In the early morning hours of December 21, Nicole, Richard, and Darryl were at Nicole's house on E. 59th Street in Cleveland, Ohio. Darryl, Nicole's brother, had gone upstairs, and Nicole and Richard, who had been dating for several weeks, were downstairs playing cards and watching television. At approximately 2 a.m., Nicole heard a knock on her back door. She found Thomas, who had been her boyfriend before Richard, at the door with a young woman Nicole later learned was Farah Curry. Thomas asked Nicole if Farah could use her bathroom.

{¶ 4} Nicole directed Farah to her second floor bathroom; Farah left her personal belongings in the kitchen when she went upstairs. While Nicole and Thomas waited in the kitchen, Richard and Darryl confronted Thomas about why he would show up at Nicole's house in the middle of the night with another woman; Richard and Darryl accused Thomas of "disrespecting" Nicole through his actions.

{¶ 5} Soon after this verbal argument, Farah returned to the kitchen, and she and Thomas hurriedly left the house. Richard and Darryl followed them into the yard, and as Thomas drove away, Richard and Darryl chased the car down the street. Darryl admitted to kicking the side of the car and throwing a bottle at it as Thomas drove away. Nicole attempted to calm down her brother and Richard, and told them that Thomas always carries a

gun. After Thomas left, Richard walked away from the house and went to a local bar, and Darryl returned upstairs.

{¶ 6} Nicole then received a call from Thomas saying that Farah had left her cell phone in Nicole's kitchen; Thomas and Nicole agreed to meet at the corner of her street to avoid any further confrontation between Thomas and the other men. According to Nicole, she waited for Thomas to meet her for approximately 20 minutes, but because she was cold, she returned to her house. Shortly thereafter, Nicole heard a car horn in the street; she saw that Thomas was outside, and Nicole went outside to give Farah her cell phone.

{¶ 7} Thomas exited his car, which he left parked one or two houses beyond Nicole's and slightly blocking the street. Farah remained in the car. Nicole told Thomas that Richard had left the house and that her brother was upstairs. Thomas began calling for Darryl to come out and speak to him. Nicole got into Thomas's car to move it to the side of the road; she spoke briefly with Farah. Both women then exited the car, and Nicole walked toward Thomas who was, by this time, arguing with Darryl. Nicole testified that Thomas and her brother were "tussling" with one another, that she broke it up, and that the two men stopped and began laughing together. She and Darryl both testified that Thomas attempted to hug her, but that she pushed him away.

{¶ 8} At that moment, a car came driving up the street, and Richard exited it from the passenger side before the car came to a stop. Nicole, Darryl, and Farah all testified that Richard came toward Thomas, swearing at him. They also testified that Richard had nothing in his hands. When Richard was within ten feet of Thomas, Thomas reached under his shirt, pulled out a gun, and shot Richard. Richard fell to the ground, and Thomas ran to his car and drove off with Farah.

{¶ 9} Nicole and Darryl called 911, while they attempted to stop the bleeding from the gunshot wound to Richard's head. EMS arrived shortly thereafter; however, Richard ultimately died as a result of his injuries. Nicole and Darryl testified that after the paramedics put Richard into the ambulance, they noticed a steak knife in the street where his body had lain. The three eyewitnesses all testified they never saw Richard with the knife or any other weapon as he approached Thomas on the street.

{¶ 10} Farah testified that Thomas drove to a park on Lake Erie, and she believed he threw his gun in the lake. At trial, she testified that right before the shooting occurred, she heard either Thomas, Darryl, or Nicole say "why would you bring a knife to a gun fight?" Farah stated Richard had not arrived on the scene when she heard the comment made. She also testified that Thomas had the gun on his person the whole evening while she was with him.

{¶ 11} When the state rested its case, Thomas made a Crim.R. 29 motion, which the court denied.

{¶ 12} Thomas testified on his own behalf. His version of the facts mostly corroborated the three eyewitnesses' account up until his return to Nicole's house. Thomas testified he had not tried to hug Nicole, but that he was helping her because she slipped on the snow-covered road. He stated that when Richard exited the car he was riding in, Richard came at Thomas, swearing and reaching under his shirt to grab for something. Thomas believed he was in mortal danger, and that in his experience, the only reason someone would grab for something under his shirt would be because the person was drawing a weapon. He also thought he saw Richard holding a weapon. Thomas testified he fired his gun only because he feared for his life and was acting in self-defense.

{¶ 13} Thomas had provided a statement to the police. He thought he had hit Richard in the leg when he fired his gun. Thomas acknowledged that he knew he was not permitted to carry a gun, and he also admitted that after the shooting, he threw his gun in the lake.

{¶ 14} Thomas renewed his Crim.R. 29 motion, which the court denied. The trial court agreed to instruct the jury on self-defense and on the lesser included offenses of murder and reckless homicide. The jury convicted Thomas of the lesser-included offense of reckless homicide in violation of R.C.

2903.41(A), tampering with evidence in violation of R.C. 2921.12(A)(1), and having a weapon under disability in violation of R.C. 2923.13(A)(2). He was sentenced to three years on a probation violation in another case; five years on each conviction in the present case; and three years for the firearm specification. The trial court ran all sentences consecutively for a total of 21 years.

{¶ 15} Thomas raises four assignments of error for our review. Because of their relatedness, we discuss the first two assigned errors together.

{¶ 16} “I. The trial court erred in denying appellant’s motion for acquittal as to the charges when the state failed to present sufficient evidence against appellant.”

{¶ 17} “II. Appellant’s convictions are against the manifest weight of the evidence.”

{¶ 18} Thomas does not set forth the elements on which the state failed to present sufficient evidence to support his convictions. Essentially, he argues that he acted in self-defense, which is more properly addressed in his second assignment of error. In his second assignment of error, Thomas argues the verdicts were against the manifest weight of the evidence because Richard came at him and Thomas believed he was in imminent danger. He also suggests that his full cooperation with the police after the incident demonstrates his innocence.

{¶ 19} “Under Ohio law, self-defense is an affirmative defense. To establish self-defense, the defendant must show ‘ * * * (1) * * * [he] was not at fault in creating the situation giving rise to the affray; (2) * * * [he] has [sic] a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of * * * force; and (3) * * * [he] must not have violated any duty to retreat or avoid the danger * * *.’ The defendant is privileged to use that force which is reasonably necessary to repel the attack. ‘If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.’” (Internal citations omitted.) *State v. Williford* (1990), 49 Ohio St.3d 247, 249, 551 N.E.2d 1279.

{¶ 20} The trial court gave the jury an instruction on self-defense, as well as instructions on the lesser-included offenses of murder and reckless homicide. By finding Thomas guilty of reckless homicide, the jury did not find by a preponderance of the evidence that he acted in self-defense. While it may be true that Thomas did not instigate the fatal confrontation, there was evidence that Thomas returned to Nicole’s house after being told by Darryl and Richard to leave. Upon this evidence, the jury could find that he shared the fault giving rise to the confrontation.

{¶ 21} Thomas further argues that he believed he was in imminent danger of death or great bodily harm because he thought Richard was

reaching for a weapon and that as he approached, Richard had some kind of weapon in his hand. The evidence presented by the state, that none of the eyewitnesses saw Richard with a weapon or reaching under his shirt, is substantial enough for the jury to find Thomas was not in imminent danger.

{¶ 22} Although Nicole and Darryl discovered a steak knife on the ground where Richard lay, there was no evidence tying the knife to Richard; none of the eyewitnesses saw Richard holding the knife. Furthermore, Nicole's testimony that the steak knife resembled knives she had in her kitchen did not convince the jury, absent other evidence, that Richard had taken the knife found that morning on the street.

{¶ 23} The jury heard the witnesses, weighed the evidence, and rejected Thomas's contention that he had a bona-fide belief that he was in imminent danger of death or great bodily harm. There was substantial evidence to support the jury's conclusion that appellant had not proved this element of self-defense.

{¶ 24} Thomas's first and second assignments of error are overruled.

{¶ 25} "III. The trial court erred by ordering convictions and a consecutive sentence for separate counts of reckless homicide and having a weapon under disability and tampering with evidence because the offenses are allied offenses pursuant to R.C. 2941.25 and they are part of the same transaction under R.C. 2929.14."

{¶ 26} R.C. 2941.25(A) provides that where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the defendant may be convicted of only one of the offenses. R.C. 2941.25(B) provides that where the conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the defendant may be convicted of all the offenses.

{¶ 27} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the Ohio Supreme Court recently instructed as follows: “[C]ourts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.” *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus.

{¶ 28} Even a cursory review of the elements that make up reckless homicide,¹ tampering with evidence,² and having a weapon under disability³

¹ R.C. 2903.041: “(A) No person shall recklessly cause the death of another or the unlawful termination of another’s pregnancy.”

² R.C. 2921.12: “(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the

demonstrates the offenses are not allied under *Cabrales*. Not only is there not exact alignment, the crimes are so dissimilar that the commission of any one of them in no way automatically results in the commission of any other one.⁴

{¶ 29} We find that the three crimes that Thomas was convicted of should not have been merged, and there was no error on the part of the trial court in failing to do so. Thomas’s third assignment of error is overruled.

{¶ 30} “IV. Appellant’s consecutive sentences are contrary to law and violative of due process because the trial court failed to make and articulate the findings and reasons necessary to justify it.”

{¶ 31} The issue Thomas raises in his fourth assignment of error has been addressed by this district in several cases decided since the United States Supreme Court decided *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517.

following: (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation; * * *.”

³ R.C. 2923.13: “(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: * * * (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.”

⁴ Because we find that Thomas’s convictions are not aligned, we do not reach the second prong of *Cabrales*, in which a reviewing court considers whether there was a separate animus supporting each conviction.

{¶ 32} Thomas's argument is that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, is no longer good law, in light of *Ice*. In *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, the Ohio Supreme Court acknowledged the *Ice* decision, yet chose to follow its *Foster* decision, reiterating that trial courts “are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.” *Elmore*, quoting *Foster*. Until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*. *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564.⁵

{¶ 33} Accordingly, Thomas's fourth 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.

⁵ We note that the Ohio Supreme Court has accepted jurisdiction to decide this exact issue; that case is currently pending before the court in *State v. Hodge*, Supreme Court Case No. 2009-1997.

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

**CHRISTINE T. McMONAGLE, J., and
JAMES J. SWEENEY, J., CONCUR**