[Cite as *State v. Phillips*, 2021-Ohio-1807.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109077
v.	:	
ERNEST E. PHILLIPS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: May 21, 2021

Cuyahoga County Court of Common Pleas
Case No. CR-18-634818-A
Application for Reopening
Motion No. 543106

Appearances:

Tim Young, Ohio Public Defender, and Patrick T. Clark, Assistant State Public Defender, *for appellee*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brandon A. Piteo, Assistant Prosecuting Attorney, *for appellant*.

ANITA LASTER MAYS, P.J.:

{¶ 1} Applicant, Ernest E. Phillips, seeks to reopen his appeal in *State v. Phillips*, 8th Dist. Cuyahoga No. 109077, 2020-Ohio-4748. Phillips argues appellate

counsel was ineffective for failing to raise or properly argue the following proposed assignments of error:

> I. The trial court erred, in violation of Ernest Phillips' rights to due process and a fair trial, when it refused to instruct the jury on the inferior offenses of voluntary manslaughter, involuntary manslaughter, and aggravated assault. Fifth and Fourteenth Amendments, United States Constitution; Article I, Sections 10 and 16, Ohio Constitution; *State v. Warner*, 11th Dist. Portage No. 2008-P-0052, 2010-Ohio-4940.
>
> II. The trial court violated Ernest Phillips' rights to due process and a fair trial when it entered a judgment of conviction for murder against the manifest weight of the evidence. Fifth and Fourteenth Amendments, United States Constitution; Article I, Sections 10 and 16, Ohio Constitution; *State v. Thompkins*, 78 Ohio St.3d 38, 387, 678 N.E.2d 541 (1997).

{¶ 2} For the reasons that follow, the application is denied.

I. Background

{¶ 3} Phillips was indicted and charged with two counts of murder, one count of felonious assault, two counts of having weapons while under disability, and one count of carrying a concealed weapon. These charged stemmed from an incident that occurred at a gas station in the early morning hours of November 19, 2018. After a jury trial, Phillips was found guilty of both counts of murder, felonious assault, and carrying a concealed weapon. The trial court found him guilty of both counts of having weapons while under disability. Phillips was also found guilty of numerous firearm specifications. He received an aggregate sentence of 19.5 years to life in prison.

{¶ 4} Phillips timely perfected an appeal to this court where he argued the following assignment of error: "The trial court erred when it refused to instruct the jury on the inferior offenses of manslaughter and aggravated assault." This court, in an opinion issued October 1, 2020, overruled the sole assignment of error and affirmed Phillips's convictions.

{¶ 5} On December 30, 2020, through counsel, Phillips timely filed an application to reopen his appeal claiming that appellate counsel was ineffective for not properly arguing the single assignment of error that was raised in the appeal, and for not asserting that his convictions were against the manifest weight of the evidence. The state timely filed a brief in opposition.

II. Law and Analysis

A. Standard for Reopening

{¶ 6} App.R. 26(B) provides a means of asserting claims of ineffective assistance of appellate counsel. The applicant must apply to have his appeal reopened following the procedure set out in App.R. 26(B)(2) through (4). A timely application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). The standard used to judge a claim of ineffective assistance of appellate counsel is the same standard applied to claims of ineffective assistance of trial counsel. *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Supreme Court of Ohio has said that the applicant must show that there is a

"'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶ 7} In order to meet this standard, the applicant must demonstrate that "appellate counsel's performance [was] objectively unreasonable, and there must be a reasonable probability that the result of the appeal would have been different but for counsel's errors." *State v. Simpson*, Slip Opinion No. 2020-Ohio-6719, ¶ 14, citing *Strickland* at 688, 694; *Reed* at 535. "Under *Strickland*, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings." *Id.*, citing *Strickland* at 694.

B. Jury Instructions

{¶ 8} Phillips claims that appellate counsel rendered ineffective assistance when counsel did not develop sufficient argument to raise a claim that the trial court erred when it failed to give jury instructions for aggravated assault and involuntary manslaughter. This court's resolution of the arguments that were properly raised on appeal regarding the jury instruction for voluntary manslaughter demonstrates that this proposed assignment of error lacks merit.

{¶ 9} A jury instruction for a lesser-included offense is determined by the trial judge based on the evidence adduced at trial. "If the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged and for the state on the remaining elements, which by themselves would sustain a conviction on a lesser-included offense, then a charge on the lesser-included offense is required." (Emphasis deleted.) *State v. Kilby*, 50

Ohio St.2d 21, 24-25, 361 N.E.2d 1336 (1977). "Conversely, if the jury could not reasonably find against the state on an element of the crime, then a charge on a lesser-included offense is not only not required, but is also improper." *Id.* at 25.

{¶ 10} As we previously stated,

> "The giving of jury instructions is within the sound discretion of the trial court, and we review it for an abuse of discretion." *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, ¶ 42, citing *State v. Howard*, 8th Dist. Cuyahoga No. 100094, 2014-Ohio-2176, ¶ 35. "A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Phillips, 8th Dist. Cuyahoga No. 109077, 2020-Ohio-4748, at ¶ 7.

{¶ 11} First, we will discuss the aggravated assault instruction because this is determinative on the availability of an involuntary manslaughter instruction.

{¶ 12} Aggravated assault, as defined in R.C. 2903.12, is not a lesser included offense of felonious assault. It is an offense of an inferior degree, because "its elements are identical to those of felonious assault, except for the additional mitigating element of serious provocation." *State v. Deem*, 40 Ohio St.3d 205, 210-211, 533 N.E.2d 294 (1988). This mitigating element reduces the degree of felony when the perpetrator acts under a sudden passion or fit of rage. *State v. Maldonado*, 8th Dist. Cuyahoga No. 108907, 2020-Ohio-5616, ¶ 18, citing *State v. McDuffie*, 8th Dist. Cuyahoga No. 100826, 2014-Ohio-4924, ¶ 22.

{¶ 13} However, this court has already determined that Phillips did not act under a sudden passion or fit of rage. *Phillips*, 8th Dist. Cuyahoga No. 109077,

2020-Ohio-4748, at ¶ 14-17. Therefore, there is no probability of success had appellate counsel properly advanced this argument on appeal.

{¶ 14} Further, because there was no error in the trial court's refusal to give an aggravated assault instruction, an instruction for involuntary manslaughter was also not available to Phillips.

{¶ 15} As Phillips argues in his application, involuntary manslaughter may be a lesser-included offense to felony murder. Felony murder, defined in R.C. 2903.02(B), states, "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." Involuntary manslaughter, defined in R.C. 2903.04(A), prohibits one from causing "the death of another * * * as a proximate result of the offender's coming or attempting to commit a felony."

{¶ 16} An instruction for involuntary manslaughter is appropriate where the elements of felony murder are met, but the predicate offense is not a first- or second-degree offense of violence. *State v. Franks*, 8th Dist. Cuyahoga No. 103682, 2016-Ohio-5241, ¶ 19. The predicate offense in this case was felonious assault, a second-degree offense of violence. As explained above, because there was no error in not giving an aggravated assault instruction, the predicate offense underpinning the felony murder charge was not less than a second-degree felony offense of violence. Therefore, there was no basis to present an involuntary manslaughter instruction to the jury as argued by Phillips in his application.

{¶ 17} The felony murder charge in Count 2 and the felonious assault charge in Count 3, to which these arguments apply, merged with the murder charge in Count 1. No sentence was imposed on Counts 2 or 3. The remedy available to Phillips in a successful appeal on the jury instruction issue would be retrial on these merged offenses — a trial of no ultimate consequence. The murder charge in Count 1 that the felony murder and felonious assault charges merged into prior to sentencing would remain because it was affirmed on appeal. Phillips would have this case remanded for retrial on offenses that did not survive merger.

{¶ 18} This court and others have held that where there is an allegation that a jury instruction was incorrect for a certain offense, but that offense merged into another where the jury instruction was not infirm, then the error does not result in prejudice. *Franks*, 8th Dist. Cuyahoga No. 103682, 2016-Ohio-5241, at ¶ 18 (applying a plain error standard). *See also State v. Sheldon*, 3d Dist. Hardin No. 6-18-07, 2019-Ohio-4123, ¶ 12; *State v. Hackett*, 7th Dist. Mahoning No. 17 MA 0106, 2019-Ohio-3726, ¶ 17. This constitutes a separate reason that counsel's actions were not prejudicial to Phillips — meaning Phillips cannot meet the second prong of the test for ineffective assistance of counsel.

{¶ 19} Appellate counsel focused his arguments on the most consequential charge. This court reviewed the assignment of error and found no cause for reversal. While the argument for the other offenses raised herein were not sufficiently advanced in the direct appeal, the ruling of this court applies equally to the other lesser-included offense jury instructions that Phillips now claims were required.

{¶ 20} Phillips argues that because counsel failed to sufficiently advance these claims in the direct appeal, if his conviction for murder in Count 1 were reversed, the felony murder conviction in Count 2 would remain and Phillips would simply be resentenced on that count. While this is true, the conviction for murder in Count 1 was affirmed, so no prejudice can be shown at this juncture.

{¶ 21} Therefore, the first proposed assignment of error is overruled.

C. Manifest Weight

{¶ 22} In his second proposed assignment of error, Phillips argues that appellate counsel should have presented a manifest weight argument. He claims that recent changes to the burden of proof for self-defense virtually necessitated this claim. Further, appellate counsel, in an affidavit attached to the application, indicates that he did not review the video evidence prior to filing the appellate brief in this case. Phillips points to this, the video evidence, and the recent change in self-defense law in Ohio that shifted the burden of proof to the state.

{¶ 23} When evaluating a manifest weight of the evidence claim,

> a court must review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 328. The court must decide whether "'the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.'" *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

State v. Beasley, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 208.

{¶ 24} Recently, the defense of self-defense has undergone a change in who bears the burden of establishing that a person acted in self-defense. In Ohio, self-

defense used to require an affirmative showing by the defendant that he or she acted in self-defense. *State v. Davis*, 2016-Ohio-5630, 62 N.E.3d 189, ¶ 17 (8th Dist.). Ohio was the lone holdout in placing the burden of proof on the defendant. *Id.* A change, effective March 28, 2019, shifted the burden to the state to disprove that a defendant acted in self-defense once evidence was adduced that a defendant acted in self-defense. *State v. Ferrell*, 10th Dist. Franklin No. 19AP-816, 2020-Ohio-6879, ¶ 26. Under the current provisions of R.C. 2901.05, if there is evidence presented at trial that tends to show that a defendant acted in self-defense or in defense of another, the state must prove beyond a reasonable doubt that the defendant did not use force in self-defense or defense of another. R.C. 2901.05(B)(1). The state may meet its burden by disproving any one of the elements of self-defense beyond a reasonable doubt. *State v. Petway*, 2020-Ohio-3848, 156 N.E.3d 467, ¶ 55 (3d Dist.).

{¶ 25} In the case of the use of deadly force, the state can show that a defendant did not act in self-defense by proving "the defendant (1) was at fault in creating the situation giving rise to the affray; or (2) did not have a bona fide belief that she was in imminent danger of death or great bodily harm for which the use of deadly force was her only means of escape, or (3) violated a duty to retreat or avoid the danger." *State v. Smith*, 1st Dist. Hamilton No. C-190507, 2020-Ohio-4976, ¶ 50, citing *State v. Carney*, 10th Dist. Franklin No. 19AP-402, 2020-Ohio-2691, ¶ 31.

{¶ 26} Here, the state has shown that two elements of self-defense are lacking. First, Phillips created the affray that led to the death of the victim, and he did not try to retreat or avoid the danger in any manner.

{¶ 27} The videos that were played for the jury are of high resolution and clearly depict the events that occurred inside the gas station in the early morning hours of March 19, 2018. However, there was no audio recording of these events. Therefore, the testimony of those inside the store at the time is necessary to fully understand the events that transpired and their context.

{¶ 28} The clerk who was working at the cash register that night testified about what he heard and observed. He stated that Phillips came into the store and ordered two sandwiches. The clerk observed Phillips talking to a person on a video call. In the store video, Phillips can be seen holding the phone out in front of his face and speaking to a person over a video call. While Phillips was waiting for his sandwiches, more people entered the store, including a man trying to sell a watch to the clerk. The victim and his brother, Francisco, entered the store soon after this man. Phillips was standing in front of the clerk's checkout window when Francisco approached Phillips and began talking to the person on the other end of Phillips's video call.

{¶ 29} The clerk testified about this initial interaction between Francisco and Phillips. Francisco approached Phillips and said to the person on the other end of the video call, "'Hey girl, he's my brother, don't give him a hard time,' in a pleasant — in a pleasant way." (Tr. 430.) Phillips took umbrage, and began arguing with

Francisco. The clerk testified that Francisco was apologetic after that. (Tr. 431.) Either Francisco or the victim asked Phillips "man, this is not a big deal, and [Phillips] said, 'Oh, it's a big deal. Try me, try me.'" (Tr. 432.)

{¶ 30} Francisco testified that he approached the clerk's window where Phillips was standing and Phillips "was leaning on the counter, I believe on his cellphone, talking pretty loud." (Tr. 262.) He testified that he was at the counter talking to the clerk about buying some alcohol, when, "[Phillips] just kept saying over, I told you to move. Get the f**k outta the way. And at that time, I brushed it off, like, you know what? Ain't nobody own that s**t, and I walked off." (Tr. 264.) The video displayed for the jury showed that this interaction ended with Phillips shoving Francisco twice and Francisco walked away, consistent with his testimony. After Francisco walked away, he and Phillips continued to argue:

> Francisco: I said: F**k that. I'm not on that.
>
> Prosecutor: And did he have any response to that comment?
>
> Francisco: No, he just said -- just kept saying get the f**k outta here, and I just kept telling him I'm not on that s**t.

(Tr. 277.)

{¶ 31} After this interaction, the clerk testified the victim walked to the front windows of the store to see at which pump his car was parked. (Tr. 434.) He then walked to the counter to pay for gas with a $20 bill. The clerk testified that the victim was stating that he would "beat him," referring to Phillips, and Phillips was saying, "try me, try me." (Tr. 434-435.)

{¶ 32} The clerk later testified of Phillips, "he keep [sic] asking to both of these guys [the victim and Francisco] during all the conversation, try me, try me. And [Francisco] said why would we try you? We are not messing with you * * *." (Tr. 454). He further testified that at some point, the victim stated to Francisco that "I'll beat him," referring to Phillips. (Tr. 454.)

{¶ 33} The video shows that the victim twice approaches the register area where Phillips is standing, and from where he had not moved more than a few feet during this entire encounter. The first time, he pays the clerk for gas. The second time, he makes a slight move toward Phillips, and Phillips shoots him.

{¶ 34} Based on the above testimony and video evidence, the state asserted that it showed that Phillips was the aggressor in this situation and Phillips failed to take any opportunity to retreat or avoid the danger posed by others. This court agrees.

{¶ 35} Phillips was the only person who engaged in physical violence in the gas station. Phillips twice shoved Francisco and Francisco walked away and attempted to diffuse the situation. Phillips continued to be combative, and never moved within a few feet of the cashier window. Francisco and the victim never brandished any weapons or struck Phillips. There was only one entrance and exit at the front of the store. Phillips could have been blocked from leaving by Francisco and another individual who Phillips testified he thought was with Francisco, even though he was not. However, Francisco and the other individual who were standing in the isle near the entrance never assaulted Phillips.

{¶ 36} In response to this testimony and evidence, Phillips testified in his own defense. Phillips's testimony of the initial interaction between him and Francisco was markedly different from Francisco's or the store clerk's. After the initial encounter between Francisco and Phillips involving the person with whom Phillips was having a video call, Phillips testified that Francisco threatened him, saying, "'[M]other F, F you up. I'll punch you in your face[']and something of that sort." (Tr. 577.) Phillips claims that Francisco continued to threaten him, stating "[']Dude, I slap the s**t outta you.[']" (Tr. 578.) But, it is not Francisco who assaults Phillips after this verbal exchange. The video clearly shows that Phillips shoved Francisco twice and Francisco walked away. Phillips's version of events also conflicts with the clerk's testimony.

{¶ 37} After Francisco walked away, the victim and Phillips exchanged words. Phillips testified he said to the victim, "I don't even know you all. Just leave me alone. Let me go the F home, please, and let me go home, please." (Tr. 581.) This is not consistent with the clerk's testimony. Phillips also testified the victim threatened him, stating "I'll knock your motherf****g head off." (Tr. 581.) Phillips also said the victim stated, "you goin' home tonight, mother****r. You're gonna meet your maker, you dead b****h." (Tr. 584.) After these threats were made, Phillips stated the victim "nudg[ed] closer to me" (tr. 587) and Phillips shot him.

{¶ 38} On cross-examination, Phillips denied saying "Try me, try me." (Tr. 604.) He also stated that he could not leave the store because Francisco was standing by the exit with another individual. He further agreed with questioning

from the state that he did not walk down any other isles in the store, potentially putting distance between himself and others. This would have also placed obstacles between himself and the others. Phillips did testify that he said to Francisco, who was across the room, to "please let me go home." (Tr. 615.) No testimony from anyone else in the store indicated that Phillips ever said this or asked that he be allowed to leave.

{¶ 39} To highlight the contradictory nature of Phillips's testimony, after playing a section of the video containing the initial encounter between Phillips and Francisco, the prosecutor asked Phillips:

> You can see Francisco's expression, his mannerisms compared with your facial expression and mannerisms. You're testifying under oath that at this time, Francisco is saying I'll beat you're a**? I'll beat you up? That's your testimony?
>
> A. My testimony is he said what he would do to me, yes.
>
> Q. What was he saying he was going to do to you?
>
> A. He said I'll knock your head off.

{¶ 40} The jury viewed the video evidence, heard the contrary testimony from Francisco and the clerk, and made credibility determinations about what was said that led to the affray.

{¶ 41} The video and testimony demonstrate that Phillips was responsible for creating the affray that eventually led to the victim's death. The only physical aggression came from Phillips pushing and shoving others and shooting the victim.

Phillips also never attempted to distance himself from the others he claimed made him afraid for his life and who were threatening to kill him.

{¶ 42} The state sufficiently disproved the notion that Phillips acted in self-defense, and the jury did not lose its way in so finding. Appellate counsel was not ineffective for failing to argue that the murder conviction was against the manifest weight of the evidence. There is no reasonable probability of a different outcome had counsel advanced this issue in the appeal.

{¶ 43} Application denied.

ANITA LASTER MAYS, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
MARY EILEEN KILBANE, J., CONCUR