

[Cite as *State v. Pollard*, 2021-Ohio-2520.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 110008
 v. :
 :
 ANTOINE POLLARD, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 22, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-638000-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Mahmoud Awadallah, David Elias, and Anthony T. Miranda, Assistant Prosecuting Attorneys, *for appellee.*

David L. Doughten, *for appellant.*

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Antoine Pollard (“Pollard”) appeals his conviction and asks this court to reverse his conviction and remand to the trial court

for a new trial. In addition, Pollard asks this court to reduce his conviction for aggravated murder to a conviction of murder. We affirm Pollard's convictions.

{¶ 2} After a bench trial, the trial court found Pollard guilty of two counts of aggravated murder, in violation of R.C. 2903.01(A) and 2903.01(B); one count of aggravated burglary, in violation of R.C. 2911.11(A)(1); one count of felonious assault, in violation of R.C. 2903.11(A)(2); four counts of kidnapping, in violation of R.C. 2905.01(A)(2) and 2905.01(A)(3); one count of aggravated menacing, in violation of R.C. 2903.21(A); and one count of having weapons while under disability, in violation of R.C. 2923.13(A)(2). The first eight counts of the indictment contained one- and three-year firearm specifications. The trial court sentenced Pollard to a life sentence with parole eligibility after 45 years. The state agreed that Counts 1, 2, 5, and 9 merged for sentencing. The state elected to have Pollard sentenced on Count 2, aggravated murder in commission of a felony, in violation of R.C. 2903.01(B).

I. Facts and Procedural History

{¶ 3} On March 6, 2019, Pollard and his girlfriend Nina Bigsby ("Bigsby") visited Megan Brown ("Brown") and Nathaniel Edwards ("Edwards") at their residence. Brown, Bigsby, and Pollard smoked marijuana and drank alcohol while Edwards was working. Brown informed Bigsby and Pollard that she had to leave to pick Edwards up from work. Upon their return, the partying continued with Edwards not consuming any alcohol. During the visit, Pollard and Bigsby argued

because Bigsby found Brown and Pollard laying in a bed upstairs. The argument turned into a physical altercation, and Edwards asked Pollard to leave the home.

{¶ 4} Edwards and Pollard followed Brown back downstairs as Edwards continued to ask Pollard to leave the home. Brown testified that she was in the kitchen when she heard gunshots coming from the living room. (Tr. 191.) When Brown went into the living room, she saw Pollard standing over Edwards's body with a gun. (Tr. 196.) Brown ran past Pollard to go upstairs to get her children and then again passed Pollard to go out of the house with her two children to place them in her car. Pollard ran behind Brown out the house and forced Brown, at gunpoint, to drive him to the West 28th Street area in Cleveland. Brown stated that Pollard threatened to kill her children if she did not comply. After arriving near West 28th, Pollard exited the vehicle without incident. Brown then called the police. Bigsby testified that she left the home when Edwards demanded that Pollard leave the residence. While she was running up the street to a convenience store to call for help, Bigsby heard a gunshot. After entering the convenience store, the police were called.

{¶ 5} The autopsy of Edwards's body revealed that he had been shot 14 times. Pollard was arrested and charged. Before trial, Pollard requested a bench trial and was represented by two attorneys. One of the attorneys had to withdraw from being Pollard's counsel, and Pollard was assigned another attorney.

Thereafter, Pollard filed a motion to replace his attorney, alleging that he had not seen his attorney and that the attorney was not answering his phone calls.

{¶ 6} The trial court held a hearing, and Pollard's attorney stated that he saw Pollard at least three times in county jail. The attorney also stated that he spoke with Pollard extensively about the case on at least three occasions. The trial court asked Pollard if he remembered filing the motion, to which he responded, "I don't know." (Tr. 12.) The trial court then ruled that Pollard did not have a reason to remove his attorney. The trial court stated, "I see no reason to have [attorney] removed from this case. The Defendant's motion to replace counsel is denied, and also because there is no hybrid representation." (Tr. 12.) Pollard had not requested hybrid representation.

{¶ 7} After the trial court's denial, the trial court noted that "the Defendant is, for the record, just sitting in his seat. He appears to be looking around. And a few times that I asked questions he looked at [his attorneys], and he's also being nonresponsive to questions that I am asking." *Id.*

{¶ 8} Pollard was found guilty on all counts by the trial court and sentenced to prison. Pollard filed this appeal, assigning two errors for review:

- I. The trial court erred by advising the appellant that he had no right to hybrid counsel as guaranteed by Art. 1, Section 10 of the Ohio Constitution, thereby causing an invalid waiver of that right; and,
- II. The evidence is insufficient to establish the element of prior calculation and design pursuant to Count One of the indictment, aggravated murder, pursuant to R.C. 2903.01(A).

II. Hybrid Representation

{¶ 9} In Pollard’s first assignment of error, he argues that the trial court erred by advising him that he did not have a right to hybrid counsel and that such misstatement of law affected his right to counsel under the Ohio Constitution. In making his argument, Pollard relies on the concurring opinion in *State v. Hackett*, Slip Opinion No. 2020-Ohio-6699 (Fisher, J., concurring.).

{¶ 10} In *Hackett*, the Ohio Supreme Court held that under the Sixth Amendment to the Constitution of the United States, there is no right to standby counsel. *Id.* at ¶ 8. The concurring opinion agreed with the majority opinion in finding that the federal constitution did not provide any right to standby counsel, but opined that Article I, Section 10 of the Ohio Constitution provides for assistance of a counsel for a pro se defendant. *Id.* at ¶ 34-38. However, because we find that Pollard never asked the court to represent himself or raised the issue of hybrid counsel, Pollard’s argument is not well taken.

{¶ 11} Pollard filed a pro se motion to replace appointed counsel. At a hearing, the trial court addressed Powell regarding the request to replace counsel. The trial court also heard from counsel and found, “no reason to have [the attorney] removed from this case. The Defendant’s motion to replace counsel is denied, and also because there is no hybrid representation.” (Tr. 12.) “It is well established that although a defendant has the right to counsel or the right to act pro se, a defendant does not have any right to ‘hybrid representation.’” *State v. Mongo*, 8th Dist.

Cuyahoga No. 100926, 2015-Ohio-1139, ¶ 13. We note that the record reveals that Pollard did not request hybrid representation, but rather filed a motion to replace present counsel.

{¶ 12} Pollard does not complain that the trial court erred by not replacing counsel, but instead speculates that an off-the-record comment prodded the trial court to state that there is no hybrid representation. Pollard’s argument is misplaced. The trial court’s statement is a response to Pollard filing a pro se motion and is not a misstatement of the law in Ohio. “When a defendant is represented by counsel, a trial court cannot consider a defendant’s pro se motion.” *State v. Pierce*, 8th Dist. Cuyahoga No. 107752, 2019-Ohio-3762, ¶ 9, citing *Mongo* at ¶ 14. “Such an act by the court supports hybrid representation in violation of the established law.” *Id. at id.* See also *State v. Forrest*, 8th Dist. Cuyahoga No. 109230, 2021-Ohio-122, ¶ 19 (“Ohio does not recognize hybrid representation.”); *State v. Harris*, 8th Dist. Cuyahoga No. 108377, 2020-Ohio-5425, ¶ 32 (“The Supreme Court of Ohio has clarified that hybrid representation is not permitted in Ohio.”). The trial court’s statement was correct and it served to inform Pollard why it would not consider Pollard’s pro se motion.

{¶ 13} Therefore, Pollard’s first assignment of error is overruled.

III. Sufficiency of the Evidence

{¶ 14} Pollard argues that the evidence was not sufficient to convict him of aggravated murder pursuant to R.C. 2903.01(A). “Crim.R. 32(C) specifies what a

judgment entry of conviction must contain: ‘A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence.’” *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 8. See, e.g., *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 12, citing *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 135 (“A ‘conviction’ consists of a guilty verdict and the imposition of a sentence or penalty.”).

{¶ 15} The facts in *State v. Banks*, 8th Dist. Cuyahoga No. 108166, 2020-Ohio-3029, are analogous to the facts in this instant case. In *Banks*, the appellant was found guilty on all counts charged and the trial court merged some of the counts. The state elected to have the appellant sentenced on one of the counts. The appellant appealed, arguing that the evidence was insufficient to convict him on one of the merged counts. The court ruled that because the counts merged and the trial court sentenced the appellant on another count, there was no conviction on the count that he appealed. A defendant cannot challenge a conviction that was merged because “[t]he counts that merged with the [count of] conviction are not convictions, and therefore, we cannot individually review the evidence supporting those findings of guilt.” *Id.* at ¶ 23, quoting *State v. Worley*, 8th Dist. Cuyahoga No. 103105, 2016-Ohio-2722, at ¶ 23.

{¶ 16} Pollard is asking this court to review the sufficiency of the evidence for Count 1, aggravated murder, in violation of R.C. 2903.01(A). However, Count 1

merged into Count 2 and, therefore, Pollard was not sentenced for aggravated murder, in violation of R.C. 2903.01(A), but rather aggravated murder, in violation of R.C. 2903.01(B). We cannot review the evidence supporting the findings of guilt for R.C. 2903.01(A) because this count is not a conviction. *See, e.g., State v. Worley*, 8th Dist. Cuyahoga No. 103105, 2016-Ohio-2722, ¶ 23 (“The counts that merged with the aggravated murder conviction are not convictions, and therefore, we cannot individually review the evidence supporting those findings of guilt.”); *State v. Williams*, 4th Dist. Scioto No. 11CA3408, 2012-Ohio-4693, ¶ 54; *State v. Ramos*, 8th Dist. Cuyahoga No. 103596, 2016-Ohio-7685, ¶ 15; *State v. McKinney*, 10th Dist. Franklin No. 08AP-23, 2008-Ohio-6522, ¶ 39 (only reviewing the sufficiency of the evidence for the crime for which the sentence was imposed and not the counts merged into that crime).

{¶ 17} Therefore, Pollard’s second assignment of error is overruled.

{¶ 18} 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.

ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, A.J., and
MICHELLE J. SHEEHAN, J., CONCUR