

[Cite as *State v. Garnett*, 2010-Ohio-3303.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090471
	:	TRIAL NO. B-0807930
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
RAVEA GARNETT,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentences Vacated in Part, and Cause Remanded

Date of Judgment Entry on Appeal: July 16, 2010

Joseph T. Deters, Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Chief Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela Stagnaro, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

WILLIAM L. MALLORY, Judge.

{¶1} Following a jury trial, defendant-appellant Ravea Garnett was convicted of two counts of murder,¹ two counts of attempted murder,² three counts of felonious assault,³ carrying a concealed weapon,⁴ and having weapons under a disability.⁵ The trial court imposed an aggregate sentence of 44½ years' to life incarceration. In this appeal, Garnett argues that his right to a fair and impartial trial was violated, that his convictions were against the weight and sufficiency of the evidence, and that his sentence was excessive. Garnett's assignments of error are overruled with the exception that the trial court erred in failing to merge the attempted-murder and felonious-assault counts for sentencing and in sentencing Garnett to 18 years' to life imprisonment for murder. Felonious assault and attempted murder are allied offenses of similar import for which only one sentence should have been imposed,⁶ and the applicable statutory range for Garnett's murder conviction was 15 years to life. The sentences for those offenses are vacated, and this cause is remanded for the imposition of the appropriate sentences. In all other respects, the trial court's judgment is affirmed.

1. A Senseless and Unfortunate Killing

{¶2} In August 2008, Jonathan Williams stepped on Dale Drummond's shoes. Drummond became upset and the two argued briefly. After a few hours, Williams was standing on a corner with his cousin Derrick Johnson when Drummond and Garnett approached. Garnett drew a pistol from his waistband,

¹ R.C. 2903.03(A) and 2903.02(B).

² R.C. 2923.02(A) and 2903.02(A).

³ R.C. 2903.11(A)(1) and 2903.11(A)(2).

⁴ R.C. 2923.12(A)(2).

⁵ R.C. 2923.13(A)(3).

⁶ *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937.

Williams and Johnson fled, and Garnett opened fire. Garnett discharged the pistol four times: one bullet hit Johnson in the hip and another became lodged in Cynthia Miller's neck. Miller, who was an innocent bystander, was instantly paralyzed, and three weeks later she died of sepsis.

{¶3} Police responded to calls that Miller had been shot, and those callers indicated that about four shots had been fired, and that two black males had been shooting at two other black males who were running away.

{¶4} At the scene, the police recovered four .380-caliber casings. Johnson's mother later notified the police that Johnson had been shot and gave them an address where they could find him. On responding to that address, police found Johnson, who had been shot in the left hip. Johnson told the police that "Ravea [had shot him]." Johnson then identified Garnett as the shooter from a photographic lineup, and he again confirmed, in September 2008, that Garnett had been the shooter.

II. Trial

{¶5} Both Johnson and Williams were subpoenaed to testify at trial, and Johnson appeared on the first day of trial but he did not return—at least not willingly. The police eventually found Johnson, and he was called as a witness by the court. Johnson testified that he had accepted \$1,000 not to testify against Garnett, that he had told Williams that he had taken money not to testify, and that he had attempted to persuade Williams to do the same.

{¶6} Williams did not respond to the subpoena, and after police found him, he refused to testify. The court found Williams in contempt of court, and it then declared him unavailable as a witness. Williams had previously testified in a juvenile bindover hearing that Garnett had been the shooter, and that testimony was read

into evidence, over objection, because Williams was unavailable, because he had made the prior statements while under oath, and because defense counsel had been afforded the opportunity to cross-examine Williams in the juvenile hearing.

III. The Right to a Fair and Impartial Trial

{¶7} Garnett's first assignment of error contends that the trial court erred in allowing Williams's testimony at the juvenile bindover hearing to be read into evidence at trial in lieu of live testimony. In his second assignment, Garnett argues that the trial court erred in allowing the prosecution to make improper remarks to the jury and to introduce improper evidence. We consider in order these two assignments of error alleging that his fair-trial rights had been violated.

{¶8} In admitting Williams's prior testimony, the trial court relied on Evid.R. 804(B)(1), which allows a trial court to admit into evidence the former testimony of an unavailable witness. The former testimony of an unavailable witness may be introduced in evidence as an exception to the hearsay rule if the "[t]estimony [was given] at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability."⁷ Garnett argues that because he was not given the opportunity at the juvenile hearing to meaningfully develop Williams's testimony on cross-examination, the trial court should not have admitted the prior testimony. In support of this argument, Garnett asserts that the opportunity to cross-examine Williams at the bindover hearing was insufficient

⁷ Evid.R. 804; *State v. Strickland*, 10th Dist. No. 06AP-1269, 2008-Ohio-1104.

because the motive for cross-examination at the hearing was different than that in the criminal trial. Not so.

{¶9} Williams's testimony at the bindover hearing was that Garnett had been the shooter. It is undisputed that Garnett had the opportunity to develop Williams's testimony by direct, cross-, or redirect examination at the bindover hearing. And Garnett's motive in developing Williams's testimony at the bindover hearing was similar to that at trial: to question, develop, explain, and expand on Williams's testimony identifying Garnett as the shooter. We also conclude that the testimony given at the bindover hearing was reliable. Garnett's counsel questioned Williams's version of the events, but Williams did not waver in testifying that, from a distance of about six to eight feet, he had seen Garnett produce a gun from his waistband, and that, as soon as he saw the gun, he began to run. Garnett's counsel even got Williams to admit that he had not actually seen Garnett shoot the gun. We are satisfied that Garnett had an opportunity and similar motive to develop Williams's testimony at the bindover hearing, and that the testimony was reliable. We therefore conclude that Williams's testimony was properly admitted under Evid.R. 804.

{¶10} Garnett next argues that the trial court erred in allowing the prosecution to make improper remarks and to introduce prejudicial evidence.

{¶11} In the context of the entire trial, the prosecution's challenged remarks, comments, and evidence were proper. We, therefore, summarily overrule this assignment of error because our review of the record has not revealed any instance of prejudicial misconduct.

IV. Weight and Sufficiency of the Evidence.

{¶12} Garnett's next assignment of error challenges the weight and sufficiency of the evidence used to convict him.

{¶13} When reviewing the sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the state. We must then determine whether that evidence could have convinced a rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.⁸ On the other hand, a review of the weight of the evidence puts the appellate court in the role of a “thirteenth juror.”⁹ We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.¹⁰ A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction.¹¹

{¶14} In challenging the evidence underlying his convictions, Garnett argues that there was a lack of physical evidence, that no witness had actually seen him shoot the gun, and that the state failed to prove that he had purposely attempted to cause the death of Williams, Miller, or Johnson. These arguments have no merit.

{¶15} Police responded to 911 calls that Miller had been shot. At the scene, witnesses said that two black males had been shooting at two other black males. Johnson’s mother then arrived at the scene and told the police that her son had been shot, and when the police interviewed Johnson, he stated that Garnett had shot him. Johnson then identified Garnett and Drummond from a photographic lineup and maintained that Garnett had shot him. At trial, Johnson failed to appear and reluctantly testified only after police had apprehended him. He testified that he had taken money to remain silent and that he had attempted to persuade Williams to do the same. In a

⁸ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

⁹ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

¹⁰ *Id.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211.

¹¹ *Id.*

contortion of words, Johnson testified that he had seen Garnett with a gun, but that he did not actually see him pull the trigger. Johnson also admitted that he had told the police that Garnett had shot him, that he had identified Garnett as the shooter from a photographic lineup on the day of the shooting, and that a few months after the shooting he had again identified Garnett as the shooter. Finally, Johnson placed himself, Williams, Drummond, and Garnett at the crime scene, although he testified that he had anticipated that there was only going to be a fistfight.

{¶16} Williams did not testify at trial, as we have already noted, but in his former testimony he likewise identified Garnett as the shooter.

{¶17} Police also found four shell casings at the scene of the crimes, which corroborated the 911 callers' tips that about four shots had been fired, and that two black males had been shooting at two other black males who were running away. The testimony at trial was damning, and although Johnson backed away from his initial statement that Garnett had been the shooter, he also admitted taking bribe money to remain silent. The prior testimony and other evidence was sufficient to support the convictions, and we are convinced that the jury did not lose its way in finding Garnett guilty. This assignment of error is accordingly overruled.

V. Sentencing

{¶18} Garnett's final assignment of error contends that the trial court erred in failing to merge his attempted-murder and felonious-assault convictions, that the convictions for carrying a concealed weapon and having a weapon while under a disability involved allied offenses of similar import, that the imposition of consecutive sentences was in error, and that the trial court improperly sentenced him for the murder to serve 18 years to life instead of 15 years to life.

{¶19} The Ohio Supreme Court has recently held that “felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined by R.C. 2903.02(B) and 2923.02[, and] felonious assault as defined in R.C. 2903.11(A)(2) is an allied offense of attempted murder as defined by R.C. 2903.02(A) and 2923.02.”¹² Although in this case the sentences for the offenses were concurrent, the trial court nonetheless erred in failing to merge the felonious-assault and attempted-murder convictions, and those sentences are accordingly vacated.

{¶20} Garnett argues that carrying a concealed weapon and having a weapon while under a disability are also allied offenses of similar import. Not so. *State v. Rice* (1982), 69 Ohio St.2d 422, 433 N.E.2d 175, is still the law in Ohio, and under its holding carrying a concealed weapon and having a weapon under a disability are not allied offenses of similar import.¹³

{¶21} Garnett next contends that the trial court erred in imposing consecutive sentences. But we have already determined that, following *Oregon v. Ice*,¹⁴ Ohio courts still have the authority to impose consecutive sentences,¹⁵ and Garnett’s assignment of error in this regard is without merit.

{¶22} Finally, Garnett argues that the proper term of imprisonment for murder is 15 years to life. He is right. The trial court erred in sentencing Garnett to 18 years’ to life incarceration,¹⁶ and that sentence is vacated.

¹² *Williams*, supra.

¹³ See, also, *State v. Sims*, 8th Dist. No. 89261, 2007-Ohio-6821.

¹⁴ (2009), ___ U.S. ___, 129 S.Ct. 711,

¹⁵ *State v. Long*, 1st Dist. Nos. C-090248 and C-090249, 2010-Ohio-1062, ¶36, citing *State v. McCrary*, 1st Dist. No. C-080860, 2009-Ohio-4390, ¶35.

¹⁶ R.C. 2929.02(B)(1).

VI. Summary

{¶23} The judgment of the trial court is affirmed insofar as the findings of guilt and a portion of the sentences are concerned, but the sentences imposing multiple terms of imprisonment for allied offenses of similar import and an unlawful period of incarceration for murder are vacated. This cause is remanded to the trial court for resentencing in accordance with the law.

Judgment accordingly.

HILDEBRANDT, P.J., and HENDON, J., concur.

Please Note:

The court has recorded its own entry this date.