[Cite as *State v. Kelly*, 2002-Ohio-5797.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 02AP-195
Daryl D. Kelly,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on October 24, 2002

Ron O'Brien, Prosecuting Attorney, and *Susan E. Day,* for appellee.

William J. Owen, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Daryl D. Kelly, appeals from a judgment of the Franklin County Court of Common Pleas finding defendant guilty of involuntary manslaughter, aggravated arson, and five counts of felonious assault. Because defendant's convictions are supported by the sufficiency of the evidence and by the manifest weight of the evidence, and because aggravated arson and felonious assault are not allied offenses under R.C. 2941.25, we affirm.

{¶2} In the early morning of October 27, 1997, someone set fire to half of a double on South Wheatland Avenue in Columbus, Ohio, by throwing a Molotov cocktail through the front window of the residence. At the outbreak of the fire, six people, including three children, were in the residence. Investigation of the incident led to defendant's indictment on two counts of aggravated murder with multiple death penalty specifications, five counts of attempted murder, one count of aggravated arson, and five counts of felonious assault.

{¶3} According to the state's evidence, at about three o'clock in the morning on October 27, 1997, one of the household members of the Wheatland Avenue residence, Terrence Hall, was asleep on a couch located on the first floor of the house. He was awakened by the sound of breaking glass. Because the kitchen had many windows, Hall investigated the kitchen at the rear of the house. Within a short time, Hall observed smoke and flames coming from the front portion of the house and he smelled a strong chemical odor. Unable because of smoke and flames to go up the stairs to warn the rest of the household, Hall ran outside and threw rocks at one of the bedroom windows to awaken the other adult occupants.

{¶4} The other adults eventually awoke but they were unable to rescue Shenequa and Elijah Bell, who were staying in another bedroom. Firefighters quickly arrived at the scene and eventually rescued the two children from the burning structure. Five-year-old Shenequa died from injuries she sustained in the fire. Three-year-old Elijah suffered significant injuries that required a hospital stay of several months and resulted in permanent scarring.

{¶5} Because the fire was suspicious, fire investigators were contacted to inspect the residence after the fire was extinguished. Based on charring patterns, the amount of window glass inside the front room, and the minimal amount of glass outside, a fire investigator concluded the origin of the fire was in the front living room of the house and a Molotov cocktail containing accelerant was used to ignite the fire. Nonetheless, no evidence of a receptacle containing accelerant was found at the scene. Using a specially trained dog, another fire investigator discovered two areas that possibly contained the presence of an accelerant used in starting the fire. Laboratory analysis of the samples

from the identified areas did not reveal the presence of any accelerant in either of the samples. Subsequent laboratory testing did not reveal the presence of any explosive residue in the samples.

{¶6} Police ultimately received a tip that defendant had admitted to Peggy Sue Turner he firebombed the residence on Wheatland Avenue. Police contacted Turner, who was incarcerated at the time and who had a history of crack cocaine use. After her release from jail, Turner cooperated with police by agreeing to wear a transmitter so conversations with defendant could be taped. On February 9, 1999, with police monitoring and recording Turner's conversations, defendant discussed with Turner his connection with the Wheatland Avenue firebombing. At trial, Turner, who claimed she was now sober, testified on direct examination that on February 9, 1999, defendant stated he received "a fifty," $50 worth of crack cocaine, to set the Wheatland Avenue residence on fire. In support of her testimony, an excerpt from the tape recordings was played in court.

{¶7} On cross-examination of Turner, defendant elicited testimony that defendant did not admit to firebombing the Wheatland Avenue residence, but only to receiving payment to do the firebombing. Given that defendant was a crack cocaine addict with a history of dishonest dealings, defendant's questions suggested defendant may have accepted the crack cocaine without carrying out the agreement to firebomb the Wheatland Avenue house. At the time of Turner's release from jail, police provided Turner with some financial assistance and, later, Crime Stoppers, an independent organization, awarded $1,000 to Turner at the direction of police.

{¶8} The state's evidence further revealed defendant was a "runner" or middleman for Leah Smith, who was characterized as a drug dealer. Prior to October 27, 1997, Smith lived in the other half of the Wheatland Avenue double. The evidence at trial suggested she arranged to have defendant set fire to the residence in exchange for a $50 amount of crack cocaine. Smith was a former friend of Aleta Bell, one of the residents of the firebombed house, but their friendship deteriorated because of Smith's alleged criminal activities, including the alleged theft of a safe from Bell's home and of Bell's

personal information to make fake identification documents. In October 1999, Smith entered a guilty plea for an August 1997 burglary of the Wheatland Avenue residence.

{¶9} Two inmate witnesses testified defendant exhibited remorse following the firebombing because he did not know any children were in the residence. The witnesses interpreted defendant's behavior as support for his involvement in the firebombing. While the federal inmate who cooperated was to have a letter outlining his cooperation forwarded to the United States attorney, the state inmate did not receive any consideration for his cooperation.

{¶10} Defendant was tried before a three-judge panel that found defendant guilty of the lesser included offense of involuntary manslaughter, aggravated arson and five counts of felonious assault. The trial court entered judgment and sentenced defendant accordingly. Defendant appeals, assigning two errors:

{¶11} "ASSIGNMENT OF ERROR I

{¶12} "APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JUDGMENT OF THE TRIAL COURT, AND THE CONVICTION IS OTHERWISE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶13} "ASSIGNMENT OF ERROR II

{¶14} "THE COURT ERRED AS A MATTER OF LAW IN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES FOR TWO ALLIED OFFENSES OF SIMILAR IMPORT CONTRARY TO THE DOUBLE JEOPARDY CLAUSE CONTAINED IN SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION."

{¶15} To the extent defendant challenges his conviction as not supported by sufficient evidence, we construe the evidence in favor of the prosecution and determine whether such evidence permits any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), Franklin App. No. 93AP-387.

{¶16} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether the factfinder's verdict is supported by sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387 ("[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). *Conley*, supra.

{¶17} In his first assignment of error, defendant contends his conviction is not supported by sufficient evidence or the manifest weight of the evidence because (1) the credibility of some state witnesses is suspect due to their receiving a reduction in prison terms or no jail time, (2) the audio tape recordings that were introduced at trial are, for the most part, unintelligible, (3) the evidence does not support a conclusion that a Molotov cocktail started the fire on Wheatland Avenue, and (4) the evidence is lacking that accelerant was used to start the fire.

{¶18} Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A reduction in prison time or the avoidance of jail time affects the weight of the evidence. Cf. *State v. Wolery* (1976), 46 Ohio St.2d 316, paragraph one of the syllabus, certiorari denied, 429 U.S. 932, 97 S.Ct. 339 ("[w]hen fully disclosed to the jury, a promise of immunity offered by the prosecuting attorney to a witness in exchange for his testimony affects the weight to be given that testimony, not its admissibility"). Here, the evidence did not reflect any actual reductions in sentences. While the federal inmate was promised a letter to the United States attorney that outlined his cooperation, the evidence does not indicate whether his sentence was reduced. Turner's charges resulting from a raid on her house were dropped for a future indictment. At the time of trial, Turner had not been indicted. Although defendant contended a deal had been struck, no direct evidence of an agreement is in the record. Moreover, the trial court as factfinder, taking into account the witnesses' manner and demeanor, had the prerogative to weigh the credibility and weight of testimony in light of any witness avoiding jail time or gaining

reductions in prison time as a result of testifying. Accordingly, defendant's first argument is unpersuasive.

{¶19} As to defendant's second argument, we agree the tape recordings are largely indecipherable and incomprehensible because of poor sound quality. The trial court, however, did not base its judgment solely on the tape recordings, but also considered the testimony of Turner. Turner had personal knowledge about what defendant said on the evening of February 9, 1999.

{¶20} According to Turner, on February 9, 1999, defendant stated to her that Smith gave defendant "a fifty to blow up the babies and the whole house." (Tr. 388.) Turner also testified defendant later contradicted his earlier statement when he told her he did not know babies were in the house, and defendant appeared remorseful and angry with Smith because Smith did not inform defendant of that fact. Even though the tape recordings were largely indecipherable and incomprehensible because of poor sound quality, the poor sound quality is not fatal, given the testimony of Turner in conjunction with the testimony of Detective Edward Kallay who monitored the transmitter broadcast and whose testimony served to corroborate Turner's testimony.

{¶21} Moreover, the trial court, as trier of the facts, was in a position to consider and weigh all the testimony presented at trial, including Turner's testimony on direct and cross-examination concerning defendant's statements. The trial court further was free to believe all, part, or none of the testimony of other state witnesses who interpreted remorse on the part of defendant as possible substantiation of defendant's involvement in the firebombing. *State v. McDonald*, Ross App. No. 01CA2640, 2002-Ohio-3326, at ¶17. Under those parameters, the trial court's reliance, in part, on the tape recorded conversations, is not reversible error.

{¶22} Defendant's third and fourth arguments additionally contend the state presented insufficient evidence to conclude that a Molotov cocktail started the fire on Wheatland Avenue and that an accelerant was used to start the fire. A fire investigator determined the fire was not the result of electrical causes, natural causes, cooking, or smoking. Although fire investigators found no container or other remnants of a Molotov cocktail, a fire investigator observed glass inside the front living room, with only a minimal

amount of glass outside. According to the fire investigator, that fact suggested an item was thrown into the house from the outside, and it was inconsistent with an explosion from within the home that would have projected glass from the house to the outside. Charring patterns confirmed his conclusions about the fire's point of origin and the presence of accelerant.

{¶23} In addition, Battalion Chief Tom Hackett of the Division of Fire, city of Columbus, testified that, based on his observations, a "flash over" occurred when firefighters attempted to extinguish the fire, suggesting the presence of flammable liquids. Even though laboratory tests failed to confirm the presence of an accelerant or explosive residue, the record contains sufficient other evidence, if believed, to conclude a Molotov cocktail or accelerant was used to start the fire. Moreover, the laboratory results are not so conclusive as to render the trial court's decision against the manifest weight of the evidence.

{¶24} Accordingly, the evidence, construed in favor of the state, permits any rational trier of fact to find the essential elements of the offenses beyond a reasonable doubt. See former R.C. 2903.04(A) (involuntary manslaughter); see, also, R.C. 2909.02(A) (aggravated arson); see, also, former R.C. 2903.11(A) (felonious assault). Moreover, the trial court's determination is supported by sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt and, therefore, it is not against the manifest weight of the evidence. Defendant's first assignment of error is overruled.

{¶25} Defendant's second assignment of error contends the trial court erred in sentencing defendant to consecutive sentences for two allied offenses of similar import, namely, aggravated arson and felonious assault.

{¶26} Preliminarily, because defendant failed to object in the trial court, he waived any error. Absent objection, plain error must be proven to warrant reversal. *State v. Lee* (Dec. 18, 2001), Franklin App. No. 01AP-16, appeal not allowed (2002), 95 Ohio St.3d 1436, citing *State v. Moss* (Dec. 28, 1999), Franklin App. No. 99AP-30. See, also, Crim.R. 52(B). However, even if a forfeited error satisfies the requirements of Crim.R. 52(B), "Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states

only that a reviewing court 'may' notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶27} R.C. 2941.25 governs allied offenses, and provides:

{¶28} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶29} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶30} "Under an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*." *State v. Rance* (1999), 85 Ohio St.3d 632, paragraph one of the syllabus, overruling *Newark v. Vazirani* (1990), 48 Ohio St.3d 81 (Emphasis sic.) "Courts should assess, by aligning the elements of each crime in the abstract, whether the statutory elements of the crimes 'correspond to such a degree that the commission of one crime will result in the commission of the other.' * * * And if the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus." *Rance* at 638-639. (Citations omitted.) If a trial court's sentence is in accord with R.C. 2941.25, the harmony with legislative intent precludes an unconstitutional label. Id. at 635.

{¶31} Here, defendant contends aggravated arson and felonious assault are offenses of similar import. R.C. 2909.02(A), aggravated arson, provides that "[n]o person, by means of fire or explosion, shall knowingly do any of the following: (1) Create a substantial risk of serious physical harm to any person other than the offender; (2) Cause

physical harm to any occupied structure; (3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure." Under former R.C. 2903.11(A) covering felonious assault, "[n]o person shall knowingly: (1) Cause serious physical harm to another; (2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code."

{¶32} Thus, a former R.C. 2903.11(A)(1) felonious assault need not be committed by fire or explosion, and involved activity directed to a specific individual or individuals. By contrast, aggravated arson necessarily is committed with fire or an explosive and does not require that the offender cause or attempt to cause harm to any person. Accordingly, the commission of one offense can occur without commission of the other, and thus they are of dissimilar import. Because the offenses are of dissimilar import, consecutive sentences are permissible. See *Rance* at 636 ("If the elements do not so correspond, the offenses are of dissimilar import and the court's inquiry ends – the multiple convictions are permitted"). Defendant's second assignment of error is not well-taken and is overruled.

{¶33} Having overruled defendant's two assignments of error, we affirm the trial court's judgment.

Judgment affirmed.

TYACK, P.J., and PETREE, J., concur.

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