

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 23409
 vs. : T.C. CASE NO. 08CR1471/2
 TIMOTHY REID : (Criminal Appeal from
 Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 16th day of April, 2010.

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GRADY, J.:

{¶ 1} Defendant, Timothy Reid, appeals from his convictions for the offenses of murder, two counts of felonious assault, and having weapons while under a disability, and the sentences imposed on those convictions pursuant to law.

{¶ 2} On April 10, 2008, Christopher Ousley was shot three

times by two men outside Nathan's Superette carryout store on Delphis Avenue in Dayton. Reid and his cousin, Lonnie Scandruck, were subsequently arrested for the shooting. When interviewed by police Reid admitted being present during the shooting, but claimed that the shots were fired by Scandruck and another man, Roderick Norvell.

{¶3} Defendant was indicted on one count of murder, R.C. 2903.02(B), one count of felonious assault in violation of R.C. 2903.11(A)(1), one count of felonious assault in violation of R.C. 2903.11(A)(2), and having weapons while under a disability. R.C. 2923.13(A)(2). A three year firearm specification, R.C. 2941.145, was attached to each of the charges, and repeat violent offender specifications, R.C. 2941.149, were attached to the murder and felonious assault charges. Defendant was found guilty of all of the charges and firearm specifications following a jury trial. The trial court separately found Defendant guilty of all repeat violent offender specifications. The trial court sentenced Defendant to prison terms totaling twenty-nine years to life.

{¶4} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶5} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION, VIOLATED THE RULES OF EVIDENCE, DENYING APPELLANT A FAIR TRIAL AND

DUE PROCESS OF LAW, ON THE CHARGES AGAINST HIM, INCLUDING MURDER AND FELONIOUS ASSAULT, BY ALLOWING THE STATE TO INTRODUCE AND ARGUE, HIS PRIOR CONVICTION IN ARIZONA FOR MURDER IN THE FIRST DEGREE, IRREPARABLY AND UNFAIRLY PREJUDICING THE JURY AGAINST HIM, AND FAR OUTWEIGHING ANY PROBATIVE VALUE."

SECOND ASSIGNMENT OF ERROR

{¶ 6} "THE FAILURE OF TRIAL COUNSEL TO OFFER TO STIPULATE THAT MR. REID WAS A CONVICTED FELON FOR A CRIME OF VIOLENCE OR TO OBJECT TO THE INTRODUCTION OF THE NAME AND NATURE OF THE PRIOR CONVICTION FOR MURDER IN THE FIRST DEGREE, DENIED HIM HIS CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 7} These assignments of error are interrelated and will be considered together.

{¶ 8} Defendant was charged with having a weapon while under a disability in violation of R.C. 2923.13(A)(2). That section required the State to prove that Defendant knowingly had, carried or used a firearm, having been previously convicted of a felony offense of violence. The indictment specified that Defendant had been convicted of first degree murder in Arizona in 1974.

{¶ 9} It is fundamental that the State must prove every element of a charged offense, beyond a reasonable doubt. *In re Kinship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. Whenever it is necessary to prove a prior conviction, a certified copy of the

entry of judgment of the prior conviction, together with evidence sufficient to identify the defendant named in the entry as the offender currently charged, is sufficient to prove the prior conviction. R.C. 2945.75(B)(1).

{¶ 10} The State introduced certified copies of redacted documents demonstrating Defendant's prior conviction for murder in Arizona. Defendant did not object. Neither did he object to evidence showing that he is the person who was convicted in the Arizona proceeding.

{¶ 11} Defendant relies on *Old Chief v. United States* (1997), 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574. In that case the Supreme Court held that the district court abused its discretion when it rejected the defendant's offer to stipulate to a prior conviction that was an element of an offense the government was required to prove. The Supreme Court found that by permitting the government to instead introduce the full judgment record of the conviction, over the defendant's objection, the court violated Fed. Evid.R. 403, which permits the exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice.

{¶ 12} Ohio's Evid.R. 403(B) is substantially similar to Fed. Evid.R. 403. However, the Ohio rule has not been construed to apply to the facts involved in *Old Chief*. We have held that a court is

not required to accept a stipulation of a prior conviction when one is offered. *State v. Smith*, Montgomery App. No. 18654, 2001-Ohio-1396.

{¶ 13} The present case differs from *Old Chief* in that Defendant neither offered to stipulate to his prior conviction nor objected to the evidence of his prior conviction that the State offered and the court admitted. That included evidence of the nature of his prior offense, which the State offered to prove that it was a felony offense of violence, not merely a felony. Defendant therefore forfeited his right to argue on appeal that the trial court erred in admitting the evidence of his prior murder conviction for murder. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642.

{¶ 14} We may notice plain errors that occurred which affect substantial rights. Crim.R. 52(B). To satisfy that standard, the trial court's error must have affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21. However, courts are to notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶ 15} Defendant argues that admitting evidence of his prior conviction created an implication of conforming conduct, which is prohibited by Evid.R 403, and that the State exploited the prohibited implication in its arguments to the jury. The court

gave the following, limiting instruction to avoid that prospect.

{¶ 16} "Evidence was received that the Defendant was convicted of murder first degree. That evidence was received because a prior conviction is an element of the offense charged. It was not received, and you may not consider it, to prove the character of the Defendant in order to show that he acted in conformity with that character." T. 563.

{¶ 17} We have found that such limiting instructions play an important role in offsetting undue prejudice arising from proof of a prior conviction. *State v. Scott*, Montgomery App. No. 20836, 2005-Ohio-6262; *State v. Kisseberth*, Montgomery App. No. 20500, 2005-Ohio-3059. That consideration, plus the testimony of two eyewitnesses, Sean and Mark Saleh, who positively identified Defendant as one of the two men who shot Ousley, weigh against a finding of manifest injustice that the plain error standard requires. *Long*.

{¶ 18} Defendant argues that his trial counsel's failure to offer a stipulation or to object to evidence of his prior conviction for murder deprived Defendant of his Sixth Amendment right to the effective assistance of counsel.

{¶ 19} Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in

addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 20} A proper stipulation would have avoided the need for the proof of Defendant's prior conviction that the State offered and the court admitted in evidence. The jury would yet be aware of the prior conviction, however, on the court's instruction that the jury must find that Defendant had previously been convicted of a felony offense of violence.

{¶ 21} More efficient methods to avoid prejudicing the Defendant exist. Defendant could have entered a guilty plea to the weapons under disability offense. Alternatively, he could have waived his right to a jury trial on that charge, permitting it to be determined by the court. Either alternative would have wholly avoided any need to inform the jury of Defendant's prior conviction, avoiding the potential prejudice that evidence might have with respect to the murder and felonious assault charges.

{¶ 22} The difficulty with these speculations is just that: they are speculations. Defendant's acquiescence in any of these

alternatives would be necessary. We cannot know from this record whether counsel recommended a stipulation, a guilty plea, or a jury waiver to Defendant, that Defendant rejected. If counsel did, counsel cannot be found to have violated an essential duty because Defendant rejected counsel's advice. Absent evidence that the advice was not given, Defendant has failed to demonstrate that counsel was ineffective for failing to give that advice.

{¶ 23} Even were we to make the assumptions those speculations require, ineffective assistance is not demonstrated. Defendant's version of these events was that another man, Roderick Norvell, acted with Lonnie Scandrick in shooting Ousley. Defendant's counsel in her closing argument contended that law enforcement officers had ignored Norvell, "but they arrested Timothy Reid for this. Why, because he's Lonnie's cousin. Why, because he has this conviction in Arizona." (T. 536).

{¶ 24} Defendant's counsel filed a pretrial liminal motion to exclude evidence of Defendant's Arizona conviction. The trial court properly denied the motion because the State had a right and need to introduce the evidence. Once that effort failed, counsel may have concluded that she could exploit the State's evidence to Defendant's benefit, to explain why police arrested Defendant instead of Roderick Norvell. The contention supports Defendant's argument that Roderick Norvell, not Defendant Reid, joined with

Scandrlick in shooting Ousley. Such a decision is a matter of trial tactics. Reviewing courts must indulge in a strong presumption that counsel's conduct was not improper, and reject post-trial scrutiny of an act or omission that was a matter of trial tactics merely because it failed to avoid a conviction. *Strickland*.

{¶ 25} The first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 26} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN CONVICTING AND SENTENCING FOR ALLIED CRIMES OF SIMILAR IMPORT THAT SHOULD HAVE BEEN MERGED."

{¶ 27} Defendant argues that his offenses of felony murder, R.C. 2903.02(B), and felonious assault, R.C. 2903.11(A)(1) and (A)(2), are allied offenses of similar import that must be merged for conviction. In its most recent iteration on the issue of allied offenses of similar import, the Ohio Supreme Court wrote:

{¶ 28} "Our analysis of allied offenses originates in the prohibition against cumulative punishments embodied in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 10, Article I of the Ohio Constitution. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. However, both this court

and the Supreme Court of the United States have recognized that the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense but rather 'prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.' *State v. Rance* (1999), 85 Ohio St.3d 632, 635, 710 N.E.2d 699, quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 23 O.O.3d 447, 433 N.E.2d 181. Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses." *State v. Williams*, ___ Ohio St.3d ___, 2010-Ohio-147, at ¶12.

{¶ 29} In Ohio, the vehicle for determining application of the Double Jeopardy Clause to the issue of multiple punishments is R.C. 2941.25. That section states:

{¶ 30} "(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.

{¶ 31} "(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.”

{¶ 32} “A two-step analysis is required to determine whether two crimes are allied offenses of similar import. E.g. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; *Rance*, 85 Ohio St.3d at 636, 710 N.E.2d 699. Recently, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, we stated: ‘In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts 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.’ Id. at paragraph one of the syllabus. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus. Id. at ¶ 31.” *Williams*, at ¶16.

{¶ 33} Courts have sometimes applied R.C. 2941.25 as requiring merging of “convictions.” That is conceptually incorrect. When

its terms are satisfied, the court must merge multiple offenses of which a defendant is found guilty into a single conviction. That scenario contemplates multiple charged offenses on which the verdicts returned by the trier of fact pursuant to Crim.R. 31(A) contain a finding of guilt. Following the State's election of which allied offense should survive, *State v. Whitfield*, ___ Ohio St.3d ___, 2010-Ohio-2, the court must merge the offenses concerned into a single judgment of conviction entered pursuant to Crim.R. 32(C), followed by the court's imposition of a sentence on that conviction pursuant to Crim.R. 32(A). The convictions stand undisturbed.

{¶ 34} The jury returned verdicts finding Defendant guilty of the offenses of felony murder, R.C. 2903.02(B), felonious assault (serious bodily harm), R.C. 2903.11(A)(1), felonious assault (bodily harm/deadly weapon), R.C. 2903.11(A)(2), and having weapons while under a disability, R.C. 2923.13(A). The court imposed a sentence for each offense pursuant to law.

{¶ 35} In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, the defendant was charged with the same two separate forms of the offense of felonious assault; knowingly causing serious physical harm to another, R.C. 2903.11(A)(1), and knowingly causing physical harm to another by means of a deadly weapon or dangerous ordnance, R.C. 2903.11(A)(2). The evidence showed that the defendant acted

in complicity with another person who fired two shots which struck the same victim as he and the defendant fled the scene of an attempted burglary. The Supreme Court previously held that the (A) (1) and (A) (2) versions of felonious assault are allied offenses of similar import with respect to multiple assaults on the same victim. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569; *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249. The Court held likewise in *Harris*. Further, on that record, the court held that the two assaults arising from shots that struck the same victim and which were committed simultaneously were committed with the same animus. On that finding, the court held that Harris's two offenses should have been merged into a single conviction pursuant to R.C. 2941.25. *Harris*, at ¶24.

{¶ 36} On the authority of *Harris*, we find that Defendant's R.C. 2903.11(A) (1) and (A) (2) offenses of felonious assault arising from Defendant's conduct in shooting Ousley, directly and/or in complicity with Scandrick, must be merged for sentencing pursuant to R.C. 2941.25. His sentences for both offenses will be reversed and the case will be remanded to the trial court for resentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2.

{¶ 37} Defendant further argues that whichever of the two felonious assault offenses survives, he is entitled pursuant to R.C. 2941.25 to merger of that offense with his offense of felony

murder in violation of R.C. 2903.02(B). That section 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 and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶ 38} "A proximate cause of any given result is that cause which in the natural and continued sequence of events contributes to produce the result, and without which it would not have happened." *Monnin v. Fifth Third Bank of Miami Valley* (1995), 103 Ohio App.3d 213, 224. Felonious assault as defined by R.C. 2903.11(A)(1) and (A)(2) is a felony of the second or first degree. R.C. 2903.11(D). Further, R.C. 2903.11 is an "offense of violence." R.C. 2901.01(A)(9).

{¶ 39} In *Williams*, the Supreme Court held that R.C. 2903.11(A)(1), knowingly causing serious bodily harm, is an allied offense of attempted murder, R.C. 2903.02(B) and 2923.02. The holding applied to facts in which the defendant shot twice at the same victim, striking him once.

{¶ 40} Unlike *Williams*, the present case does not involve an attempt, but instead involves a completed homicide. Further, though Ousley was shot three times, only one of the shots was fatal. Nevertheless, on the authority of *Williams*, we find that

Defendant's offense of felonious assault in violation of R.C. 2903.11(A) (1) is an allied offense of his offense of felony murder, R.C. 2903.02(B), and that their merger is required for purposes of conviction, pursuant to R.C. 2941.25.

{¶ 41} Defendant also argues that his offense of felonious assault in violation of R.C. 2903.11(A) (2), causing physical harm with a deadly weapon, must be merged with his offense of felony murder. R.C. 2903.02(B) does not prohibit specific conduct. Instead, the section prohibits the result of causing the death of another as a proximate result of committing an offense of violence that is a first or second degree felony. Thus, commission of another felony offense is a necessary predicate to an R.C. 2903.02(B) offense, and the predicate felony must be a proximate cause of the death R.C. 2903.02(B) prohibits. The further issue is whether, when they involve the same conduct, R.C. 2903.11(A) (2) is an allied offense of R.C. 2903.02(B) because commission of one offense will necessarily result in commission of the other offense. *State v. Cabrales*.

{¶ 42} It is possible to commit a violation of R.C. 2903.11(A) (2), felonious assault with a deadly weapon that causes physical harm, without also causing the death of another as a proximate result in violation of R.C. 2903.02(B). However, it is not possible to cause the death of another as a proximate result

of causing physical harm with a deadly weapon in violation of R.C. 2903.02(B), without also committing a felonious assault with a deadly weapon in violation of R.C. 2903.11(A)(2). The death would not have occurred without the felonious assault having been committed, and the felonious assault is itself a cause which in the natural and continuous sequence of events involved resulted in the victim's death. On this record, the two offenses involved the same conduct. Because they were not committed separately or with a separate animus for each, their merger for purposes of R.C. 2941.25 is required. A legislative intent to permit multiple punishments is not manifested. *Williams*.

{¶ 43} The third assignment of error is sustained in part and overruled in part.

FOURTH ASSIGNMENT OF ERROR

{¶ 44} "THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY AND SENTENCING FOR SPECIFICATIONS ON COUNT 6, FELONY-MURDER, AND THE UNDERLYING COUNTS 7 AND 8, FELONIOUS ASSAULT, AND THE HWWD, COUNT 9, AS DUPLICITOUS."

{¶ 45} Defendant argues that the trial court erred in sentencing him on repeat violent offender and firearm specifications which were attached to most of the charges. Defendant claims that because most of the charges involved use of a firearm, imposing an additional consecutive sentence on the firearm specifications

attached to those charges was duplicitous.

{¶ 46} First, we note that the trial court merged the firearm specifications and imposed only one additional and consecutive three year term of imprisonment on those specifications. Likewise, the court merged the repeat violent offender specifications and imposed only one additional and consecutive nine year term of imprisonment on those specifications. In other words, Defendant was not sentenced for multiple firearm or multiple repeat violent offender specifications as he suggests.

{¶ 47} As for Defendant's contention that his conviction and consecutive sentencing on the underlying offenses and the firearm specification violates the allied offenses doctrine and double jeopardy, a firearm specification does not charge a separate criminal offense and R.C. 2941.25 does not apply. *State v. Ford*, Licking App. No. 2008CA158, 2009-Ohio-6724. A firearm specification is merely a sentencing provision that requires an enhanced penalty. *Id.*

{¶ 48} In *Missouri v. Hunter* (1983), 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535, the United States Supreme Court held that where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger v. United States* (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306, a court's task of statutory

construction is at an end and the prosecution may seek and the trial court may impose cumulative punishment under such statutes. Ohio's sentencing statutes which require a mandatory, consecutive term of imprisonment for a firearm specification, R.C. 2929.14(D)(1)(a), 2929.14(E)(1)(a), indicate a clear legislative intent to impose cumulative punishment under two statutes regardless of whether the statutes proscribe the same conduct, and therefore double jeopardy is not violated by a conviction and sentence on the underlying offense and the firearm specification. *Ford*.

{¶ 49} Defendant's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

{¶ 50} "THE TRIAL COURT ERRED IN ALLOWING THE OFFENSE OF COMPLICITY TO ENTER THE TRIAL AND INSTRUCTING THE JURY SINCE THE OFFENSE WAS NOT CHARGED IN THE INDICTMENT."

{¶ 51} Defendant complains that prosecutors argued to the jury and the trial court instructed the jury that Defendant could be found guilty if he acted in complicity with another person in committing these offenses by aiding and abetting that other person. Defendant argues that the State's argument and jury instructions on complicity constituted error because complicity was not specifically charged in the indictment.

{¶ 52} Defendant's argument is meritless in light of Ohio's

complicity statute, R.C. 2923.03, which specifically provides that a charge of complicity may be stated in terms of that section, or in terms of the principal offense. R.C. 2923.03(F). Complicity is necessarily included in any indictment, and a jury may properly be instructed on complicity even if Defendant is charged only as a principal offender. *State v. Bray*, Mahoning App. No. 04MA27, 2005-Ohio-2117. R.C. 2923.03(F) adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. *State v. Keenan*, 81 Ohio St.3d 133, 1998-Ohio-459.

{¶ 53} Defendant's fifth assignment of error is overruled.

Conclusion

{¶ 54} Having sustained Defendant's third assignment of error, in part, we will reverse and vacate Defendant-Appellant's sentences for felony murder, R.C. 2903.02(B), felonious assault causing serious bodily harm, R.C. 2903.11(A)(1), and felonious assault with a deadly weapon, R.C. 2903.11(A)(2). The sentences imposed on the specifications attached to these offenses will likewise be reversed and vacated. The case will be remanded to the trial court to merge Defendant's two offenses of felonious assault, and to merge the surviving felonious assault offense with Defendant-Appellant's offense of felony murder, and to resentence Defendant accordingly. Otherwise, the judgment of the trial court will be affirmed.

DONOVAN, P.J., And BROGAN, J., concur.

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