[Cite as *State v. Johnson*, 2010-Ohio-3861.]

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

STATE OF OHIO,	:	APPEAL NO. C-090413 TRIAL NO. B-0800258-A
Plaintiff-Appellee,	:	
vs.	:	*D E C I S I O N.*
DAVID JOHNSON,	:	
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: August 20, 2010

Joseph T. Deters, Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

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

SUNDERMANN, Judge.

{¶1} David Johnson appeals his convictions for murder, felonious assault, and tampering with evidence. Because we conclude that the trial court improperly convicted Johnson of both murder and felonious assault, we vacate the sentences for those offenses and remand this case to the trial court for resentencing in accordance with this decision. In all other respects, the judgment of the trial court is affirmed.

{¶2} Johnson was indicted for two counts of murder with specifications, felonious assault with specifications, and tampering with evidence. At trial, Carlos Mayo testified that he and his friend Michael Grace had driven to the Hawaiian Terrace apartment complex on December 28, 2007. According to Mayo, as Grace exited from the car, a man had approached the car and asked Grace, "Where you from?" The man walked past Grace and then turned around. Mayo stated that as the man walked back toward Grace, the man pulled out a gun. Mayo heard a gunshot and saw the man and Grace "tussling" on the ground. Mayo, who had a gun, fired some shots toward the man and Grace. According to Mayo, another man approached and began to fire at Mayo. When Mayo attempted to return fire, his gun jammed, so he fled from the scene. Grace fell in the parking lot and later died from two gunshot wounds.

{¶3} Mayo testified that when he had seen Johnson's photograph on a website report about the shooting, he recognized Johnson as the first man who had approached and shot Grace. He identified Johnson's photograph during an interview with police officers and later at trial.

{¶4} Savana Sorrells was in an apartment that overlooked the parking lot. She heard the gunshots and observed the shooting from the apartment. Later, she contacted the Cincinnati Police Department and identified Johnson and Marty Levingston as the men who had shot Grace. According to Sorrells, she knew the men

from the apartment complex. At trial, Sorrells again identified Johnson as one of the men whom she had seen shooting Grace. Two other witnesses, Britteny Lancaster and Brenda Griffin, testified about their observation of the shooting. They were not able to identify the men who had been involved.

{¶5} The state also presented the testimony of Robert Taylor, an inmate in the Hamilton County Justice Center, who claimed to have heard both Johnson and Levingston admit to the shooting. Taylor also testified that Levingston had offered him money and had threatened to shoot Taylor's sister in an attempt to prevent Taylor's testimony. In his defense, Johnson presented the testimony of two employees of the Justice Center to contradict Taylor's testimony about his ability to overhear conversations in the justice center.

{¶6} At the conclusion of the trial, the jury found Johnson guilty as charged. The trial court merged the two counts of murder and sentenced Johnson to a term of 15 years' to life imprisonment for murder in violation of R.C. 2903.02(A), with three years' confinement for the accompanying specification, to eight years' confinement for felonious assault, and to five years' confinement for tampering with evidence. The sentences were consecutive.

Sufficiency and Weight of the Evidence

{¶7} We consider the first three assignments of error together. In the first, Johnson asserts that his convictions were not supported by sufficient evidence. In the second, he asserts that his convictions were against the manifest weight of the evidence. And in the third, he claims that the trial court erred when it overruled his Crim.R. 29 motion for an acquittal.

{¶8} The standard of review for a sufficiency claim and for the denial of a Crim.R. 29 motion for an acquittal is the same. When an appellant challenges the sufficiency of the evidence, we must determine whether the state presented adequate

evidence on each element of the offense.[1] On the other hand, when reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.[2]

{¶9} Johnson claims that his convictions were based on insufficient evidence because there was no physical evidence to link him to the shooting, and because the eye-witnesses gave contradictory testimony. But we conclude that the state did present sufficient evidence of each of the offenses. And after reviewing the record, we cannot conclude that the jury lost its way when it found Johnson guilty of the offenses. The jury was in the best position to determine the credibility of all the witnesses. The first three assignments of error are overruled.

Sentencing

{¶10} Johnson's fourth assignment of error is that the prison sentence that was imposed by the trial court was an abuse of discretion. Our review of the sentence has two parts. First, we must determine whether the sentence was contrary to law.[3] Then, if the sentence was not contrary to law, we must review the sentence to determine whether the trial court abused its discretion.[4] Johnson concedes that the sentence fell within the applicable statutory guidelines for the offenses for which he was convicted. But he contends that the trial court abused its discretion by imposing an excessive sentence. We conclude that the sentence was not excessive, and that the trial court did not abuse its discretion. The fourth assignment of error is overruled.

Allied Offenses

{¶11} In the fifth assignment of error, Johnson asserts that the trial court erred when it sentenced him for both murder in violation of R.C. 2903.02(A) and felonious

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[1] See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.
[2] See id. at 387.
[3] *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶14.
[4] Id. at ¶17.

assault in violation of R.C. 2903.11(A)(2). Johnson contends that he should not have been convicted of both offenses because they were allied offenses of similar import.[5]

{¶12} A defendant may not be separately convicted of allied offenses of similar import unless the offenses were committed separately or with a separate animus.[6] "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."[7]

{¶13} Citing this court's decision in *State v. Love*,[8] the state argues that murder under R.C. 2903.02(A) and felonious assault under R.C. 2903.11(A)(2) are not allied offenses of similar import because it is possible to murder someone without a deadly weapon and, conversely, because it is possible to assault someone with a deadly weapon without killing him. But in its recent decision in *State v. Williams*,[9] the Ohio Supreme Court has overruled our decision in *Love*.[10] In *Williams*, the court held that attempted murder under R.C. 2903.02(B) and 2929.02 and felonious assault under R.C. 2903.11(A)(1) are allied offenses of similar import[11] and that attempted murder under R.C. 2903.02(A) and 2923.02 and felonious assault under R.C. 2903.11(A)(2) are allied offenses of similar import.[12]

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[5] See R.C. 2941.25.
[6] Id.
[7] *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus.
[8] 1st Dist. No. C-070782, 2009-Ohio-1079.
[9] 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937.
[10] 124 Ohio St.3d 560, 2010-Ohio-1421, 925 N.E.2d 137.
[11] Id., paragraph one on the syllabus.
[12] Id., paragraph two of the syllabus.

{¶14} The state also argues that the murder statute and the felonious-assault statute protect distinct societal interests. In *State v. Brown*, the Ohio Supreme Court explained that the consideration of legislative intent is important to determining whether offenses are allied offenses of similar import.[13] When statutes set forth offenses to protect different societal interests, the legislature is presumed to have intended them to be separately punishable.[14] Under this theory, the state argues that the murder statute advances the societal interest in protecting life but that the felonious-assault statute advances the societal interest of preventing physical harm to persons. Although it did not refer to *Brown*, the Ohio Supreme Court seemingly rejected this argument in *Williams*, when it concluded that attempted murder and felonious assault are allied offenses of similar import.

{¶15} We are therefore not persuaded that this case does not involve allied offenses of similar import. Rather, murder under R.C. 2903.02(A) and felonious assault under R.C. 2903.11(A)(2) are so aligned that the commission of murder necessarily results in the commission of felonious assault. Accordingly, we conclude that the two offenses are allied offenses of similar import.

{¶16} But our analysis does not stop here. Rather, having concluded that the offenses are allied offenses of similar import, we must now determine whether the offenses were committed separately or with a separate animus. In *Williams*, the Ohio Supreme Court concluded that a defendant could be convicted of two counts of attempted murder where the defendant had shot at the victim twice, hitting him once. The court stated that one count of attempted murder arose from the shot that had hit the victim and that the other arose from the shot that had missed. But here the state did not differentiate between the two shots that hit Grace. Rather, the state indicted Johnson

[13] 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶¶36-37.
[14] Id. at ¶2.

for single counts of felony murder, murder, and felonious assault. The facts of this case are comparable to those in *State v. Gandy*, in which we stated that "because the shooting involved [the defendant's] discharge of three bullets into a single victim in rapid succession, the offenses cannot be said to have been committed separately or with a separate animus as to each."[15] Similarly, we conclude in this case that the shots that hit Grace were not the result of acts committed separately or with a separate animus.

{¶17} Because the murder and felonious-assault offenses were allied offenses of similar import, the trial court erred when it convicted Johnson of both. The fifth assignment of error is sustained.

Taylor's Testimony

{¶18} In his sixth assignment of error, Johnson asserts that the trial court erred when it allowed hearsay testimony. Taylor testified that Levingston had threatened Taylor's sister and had offered him money to prevent Taylor's testimony in the trials against Levingston and Johnson. Taylor also testified that Levingston had told him that Levingston had shot Grace. Johnson asserts that this testimony was inadmissible hearsay.

{¶19} We begin with Levingston's statement about having shot Grace. Taylor's testimony about this statement was given during cross-examination in response to questions from Johnson's attorney. Johnson cannot now claim that he was prejudiced by this testimony. Any error in admitting the testimony was invited error.[16]

{¶20} With respect to the statements about Levingston threatening and offering to pay Taylor to prevent his testimony, we conclude that the statements were not hearsay because they were statements of a co-conspirator.[17] Evid.R. 801(D)(2)(e) excludes from the definition of hearsay "a statement by a co-conspirator of a party

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[15] 1st Dist. No. C-070152, 2010-Ohio-2873, ¶11.
[16] See *State v. LeMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶102.
[17] See, also, *State v. Daniels* (1993), 92 Ohio App.3d 473, 636 N.E.2d 336.

during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." The testimony of the eyewitnesses provided the independent proof of the conspiracy between Levingston and Johnson. That Levingston's statements were made after the shooting does not remove it from the purview of Evid.R. 801(D). "A declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity."[18] The trial court did not err in allowing Taylor to testify about Levingston's statements. The sixth assignment of error is overruled.

Pretrial Identification

{¶21} Johnson's seventh assignment of error is that the trial court erred when it denied his motion to suppress the pretrial identification of him by Sorrells and Mayo. The evaluation of the admissibility of a pretrial identification of a suspect has two steps. First, the trial court must determine whether the identification procedure was unduly suggestive.[19] If so, then the trial court must determine if there was a substantial likelihood of irreparable misidentification.[20]

{¶22} About a week after the shooting, Sorrells and her mother contacted police officers to relate what Sorrells had seen that night. Sorrells told the officers that the men responsible for the shooting were Johnson and Levingston, whom she knew from the Hawaiian Terrace complex. Police officers showed Sorrells a single photograph of Johnson to confirm that he was the person to whom she was referring. Later, during the hearing on the motion to suppress and at trial, Sorrells claimed that she was not sure that Levingston was involved. But she continued to state that she had seen Johnson.

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[18] *State v. Shelton* (1977), 51 Ohio St.2d 68, 364 N.E2d 1152, paragraph two of the syllabus, vacated in part (1978), 438 U.S. 909, 98 S.Ct. 3133. See, also, *Daniels*, supra.
[19] See *State v. Keeling*, 1st Dist. No. C-010610, 2002-Ohio-3299, ¶14.
[20] Id.

{¶23} Initially, Mayo was a suspect in the shooting. After Johnson had been arrested, Mayo saw Johnson's photograph on television and recognized him as one of the men who had shot Grace. When Mayo went to the Cincinnati Police Department to turn himself in, he told police officers that he had seen Johnson's photograph, and that it was Johnson who had shot Grace. Police officers showed Mayo a single photograph of Johnson to confirm the identification.

{¶24} Although one-photograph identification procedures are generally suggestive, we conclude that neither of these identifications was so unreliable that there was a substantial likelihood of irreparable misidentification. Sorrells testified that she could see what had happened and that she had instantly recognized one of the men involved as Johnson. Similarly, Mayo testified that he had clearly seen Johnson during the shooting. That Mayo identified Johnson only after the story of Johnson's arrest was broadcast on television went more to the weight of his testimony than to the reliability of the identification procedure. We conclude that the trial court did not err when it overruled Johnson's motion to suppress the pretrial identifications.

Batson Challenges

{¶25} In his eighth assignment of error, Johnson asserts that the trial court erred when it allowed the state to exclude potential jurors based on race in violation of *Batson v. Kentucky*.[21] During voir dire, the state used three of its peremptory challenges to excuse three African-Americans from the jury. Johnson objected pursuant to *Batson*.

{¶26} Evaluation of a *Batson* challenge has three steps: "First, the opponent of the strike must make a prima facie showing of discrimination. Second, the proponent must give a race-neutral explanation for the challenge. Third, the trial court must determine whether, under all the circumstances, the opponent has proven purposeful

[21] (1986), 476 U.S. 79, 106 S.Ct. 1712.

racial discrimination."[22] A trial court's determination that the state did not have a discriminatory intent will be reversed only if it is clearly erroneous.[23]

{¶27} In this case, the state excluded three African-American potential jurors. For the first exclusion, the assistant prosecutors explained that the woman had piercings and tattoos that led them to believe that she was antiestablishment. Also, according to the prosecutors, the woman did not seem to understand their questions. To justify their their exclusion of an African-American man from the jury, the prosecutors explained that they had excluded him because he had been quite vocal about holding firm on the jury and had "very almost aggressive agreement with defense counsel in many of his answers." Finally, the prosecutors explained that they had excluded a second African-American woman from the jury because she was young and because she was a single mother. The trial court concluded that the state had given race-neutral explanations with respect to all three potential jurors and overruled Johnson's objections. We conclude that the trial court's determinations were not clearly erroneous. The final assignment of error is overruled.

{¶28} Therefore, we vacate the separate sentences imposed for murder and felonious assault and remand this case for the imposition of only one sentence for either of the two offenses. In all other respects, we affirm the judgment of the trial court.

Judgment affirmed in part, sentences vacated in part, and cause remanded.

CUNNINGHAM, P.J., and **HENDON, J.,** concur.

Please Note:

The court has recorded its own entry this date.

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[22] *State v. White*, 85 Ohio St.3d 433, 436, 1999-Ohio-281, 709 N.E.2d 140, citing *Batson*, supra, at 96-98.
[23] *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310.