

[Cite as *State v. Wilson*, 2008-Ohio-4130.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22120
vs.	:	T.C. CASE NO. 06CR4325
JOSHUA E. WILSON	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 15th day of August, 2008.

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GRADY, J.:

{¶ 1} Defendant, Joshua Wilson, appeals from his conviction and sentence for murder and felonious assault.

{¶ 2} On October 8, 2006, D’Laquan Phillips and his uncle, Michael Phillips, were walking Michael’s dog on West Third Street in Dayton, when two men, one dressed in all black and

wearing a hooded sweatshirt and the other one wearing lighter colored clothing, confronted them. The two men accused D'Laquan Phillips of a trespassing offense. D'Laquan Phillips insisted they had the wrong man. An argument then ensued.

{¶ 3} D'Laquan Phillips dropped his dog's leash when confronted by the two men and Michael Phillips overhead the argument between D'Laquan Phillips and the two men while he was untangling the dog from a bush into which it had run. Michael Phillips heard a gunshot and saw D'Laquan Phillips struggling with the man dressed in black, later identified as Defendant, Joshua Wilson.

{¶ 4} D'Laquan Phillips attempted to flee from Defendant but Defendant shot D'Laquan Phillips in the back. Michael Phillips watched as D'Laquan Phillips, while lying on the ground, reached out and grabbed Defendant's pants leg. Defendant responded by shooting D'Laquan Phillips in the head. Michael Phillips ran to a neighborhood store and called police. D'Laquan Phillips died at the scene.

{¶ 5} Detective Doyle Burke of the Dayton police department assembled a photospread that included Defendant's picture. Four days after this shooting occurred, Michael Phillips identified Defendant from that photospread as the man who shot and killed D'Laquan Phillips. Three other witnesses,

Michael Huff, Jacqueline James and John Bridges, either heard and/or saw the shooting, although they could not identify the shooter.

{¶ 6} D'Laquan Phillips was shot eight times, once in the thigh, once in the hand, twice in the back, and four times in the head. All of the bullets and shell casings recovered from the victim's body or at the scene were fired from the same gun, which police found in an alley near the crime scene. Five days after this shooting, police arrested Defendant, who still wore a black hooded sweatshirt and had blood on his right shoe.

{¶ 7} Defendant was indicted on one count of purposeful murder, R.C. 2903.02(A), one count of felony murder, R.C. 2903.02(B), one count of felonious assault involving serious physical harm, R.C. 2903.11(A)(1), and one count of felonious assault involving a deadly weapon, R.C. 2903.11(A)(2). A firearm specification, R.C. 2941.145, was attached to each of the charges. Following a jury trial, Defendant was found guilty of all charges and specifications. At sentencing, the trial court merged the two murder charges and imposed one fifteen year to life sentence. The court also sentenced Defendant to eight years on each count of felonious assault, and ordered all of the sentences to be served consecutively.

Finally, the court merged the firearm specifications and imposed one additional and consecutive three year prison term, for a total aggregate sentence of thirty four years to life.

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

FIRST ASSIGNMENT OF ERROR

{¶ 9} "THE TRIAL COURT ERRED IN REFUSING TO ADMIT TESTIMONY OF TWO WITNESSES REGARDING MICHAEL PHILLIPS' ACCUSATION OF SOMEONE OTHER THAN THE DEFENDANT FOR SHOOTING HIS NEPHEW."

{¶ 10} Three State's witnesses, Michael Phillips, Jacqueline James and John Bridges, testified at trial that there were two men involved in the murder of D'Laquan Phillips. Michael Phillips identified Defendant, Joshua Wilson, as the man dressed in black who was the shooter. The other perpetrator was never identified. At trial, Defendant wanted to introduce evidence that would impeach Michael Phillips' credibility and suggest that his identification of Defendant as the shooter was mistaken. Specifically, Defendant proffered that a witness named Robert "Bobby" Matson, Sr., would testify that on the same day Michael Phillips identified Defendant from a photospread as the man who shot and killed D'Laquan Phillips, Michael Phillips also

(1) pulled a gun on Matson and his companion, Clarence "Clay" Williams, (2) accused Williams of killing D'Laquan Phillips, (3) demanded money from both Matson and Williams, and (4) struck a pedestrian with his vehicle as he fled the scene. Michael Phillips was subsequently arrested and convicted as a result of this conduct, but his conviction was for possession of heroin police found on his person.

{¶ 11} The State opposed this proposed testimony by Matson by way of a motion in limine, arguing that it was not relevant and was a collateral attack on Michael Phillips' character. Defendant argued that the testimony was directly relevant to Michael Phillips' credibility and the accuracy of his earlier identification of Defendant as the killer.

{¶ 12} The trial court refused to allow the proposed testimony by Matson, concluding that while it may possess some relevance, its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues because it contains too much collateral matter relating to Michael Phillips' bad character. The trial court did permit Defendant to impeach Michael Phillips with his felony conviction(s), so long as the circumstances surrounding them were not brought up.

{¶ 13} At the outset, we note that the State concedes in

its brief that the issue concerning the exclusion of Matson's testimony was properly preserved for appellate review by the proffer Defendant made during the hearing on the admissibility of that evidence, Evid.R. 103, and by the nature of the State's motion in limine seeking to exclude the testimony of a party's witness, which is the equivalent of a motion to suppress. See: *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 86, n. 5.

{¶ 14} The admission or exclusion of evidence is a matter resting within the sound discretion of the trial court, and its decision in such matters will not be disturbed on appeal absent an abuse of that discretion. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶172. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 15} Defendant argues that the trial court abused its discretion in not allowing the testimony by Matson, because it was directly relevant to Michael Phillips' credibility and his identification of Defendant as the shooter. Defendant points out that the only evidence linking him to this murder and identifying him as the shooter was the eyewitness testimony of

Michael Phillips. Defendant argues that Michael Phillips' conduct in accusing other men, Williams and/or Matson, of killing D'Laquan Phillips, only hours after Michael Phillips had identified Defendant from a photospread as the man who shot and killed D'Laquan Phillips, casts doubt upon Michael Phillips' credibility and his earlier identification of Defendant as the killer.

{¶ 16} We agree that Michael Phillips' testimony identifying Defendant as the shooter was critical to his conviction, and that the evidence the court excluded, Matson's testimony that Michael Phillips had accused Matson of being the shooter, could have undermined the credibility of Michael Phillips concerning his identification of Defendant. However, we cannot find that the trial court abused its discretion in excluding that evidence.

{¶ 17} Evid.R. 613(B) provides that a prior inconsistent statement of a witness is admissible if (1) the witness is given a prior opportunity to admit or deny the statement, and (2) the subject matter of the statement involves "[a] fact that may be shown by extrinsic evidence under the common law rule of impeachment if not in conflict with the Rules of Evidence." Evid.R. 613(B)(2)(c).

{¶ 18} Defendant did not seek to inquire of Michael

Phillips on cross examination whether he had accused Matson of being the man who shot and killed his nephew. Nevertheless, as the issue is presented, the question is whether Matson's proposed testimony, even had that prior inquiry been made, was admissible as extrinsic evidence.

{¶ 19} Evid.R. 616(C) provides:

{¶ 20} "Specific contradiction[.] Facts contradicting a witness's testimony may be shown for the purpose of impeaching the witness's testimony. If offered for the sole purpose of impeaching a witness's testimony, extrinsic evidence of contradiction is inadmissible unless the evidence is one of the following:

{¶ 21} "(1) Permitted by Evid. R. 608(A), 609, 613, 616(A), 616(B), or 706;

{¶ 22} "(2) Permitted by the common law of impeachment and not in conflict with the Rules of Evidence."

{¶ 23} The common law permits introduction of extrinsic evidence where such evidence is critical to determining the credibility of a witness's story. Weissenberger, Ohio Evidence Treatise (2007 Ed.), _ 616.7. Both Evid.R. 613(B)(2)(c) and 616(C) permit its introduction, but only when the evidence is "not in conflict with the Rules of Evidence."

Weissenberger writes: "this limitation is designed to ensure

that this provision is not used to circumvent the prohibition on the use of extrinsic evidence of specific acts found in Rule 608(B).” Id. at 415.

{¶ 24} Evid.R. 608(B) states, in pertinent part:

{¶ 25} “Specific instances of conduct[.] Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s character for truthfulness, other than conviction of crime as provided in Evid. R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’s character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.”

{¶ 26} Matson’s proposed testimony was extrinsic evidence that Defendant would offer for the purpose of attacking Michael Phillips’ character for untruthfulness. It was inadmissible pursuant to Evid.R. 608(B), and therefore the common law rule exception in Evid.R. 613(B)(2)(c) and 613(B) cannot apply.

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{¶ 27} Under the “collateral matter doctrine”, a party may not present extrinsic evidence to contradict a witness on a collateral matter. *Byomin v. Alvis* (1959), 169 Ohio St. 395.

The statement Michael Phillips allegedly made to Matson, though relevant to the shooting of D’Laquan Phillips, was a matter collateral to that shooting. Therefore, even had Defendant inquired of Michael Phillips whether he had accused Matson of being the shooter, and had Phillips denied that he accused Matson, Defendant could not disprove the truth of Phillips’ answer by introducing extrinsic evidence in the form of Matson’s testimony. *State v. Levin* (1984), 11 Ohio St.3d 171.

{¶ 28} Defendant’s first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 29} “THE TRIAL COURT ERRED IN NOT MERGING THE FELONIOUS ASSAULT COUNT WITH THE PURPOSEFUL MURDER CHARGE.”

{¶ 30} Defendant argues that the trial court erred in failing to merge the purposeful murder charge, R.C. 2903.02(A), and the felonious assault charge based upon causing serious physical harm, R.C. 2903.11(A)(1), because they are allied offenses of similar import under R.C. 2941.25.

{¶ 31} R.C. 2941.25 provides:

{¶ 32} “(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.

{¶ 33} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import pursuant to R.C. 2941.25(B), 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."

{¶ 34} In determining whether two or more offenses constitute allied offenses of similar import pursuant to R.C. 2941.25(A), a two step test is employed. In the first step, the statutorily defined elements of the crimes are compared in the abstract, without reference to the facts of the case or Defendant's conduct constituting the offense. *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. *Id.* If, however, the elements do not so correspond, the offenses are of dissimilar

import and the court's inquiry ends-the multiple convictions are permitted. *Id.*

{¶ 35} In the second step, the defendant's particular conduct is reviewed to determine whether the defendant can be convicted of both crimes. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses. *State v. Rance, supra.*

{¶ 36} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, the Ohio Supreme Court recently stated:

{¶ 37} "1. 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. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, clarified.)"

Syllabus.

{¶ 38} Defendant was found guilty of purposeful murder in violation of R.C. 2903.02(A), and felonious assault based upon

causing serious physical harm in violation of R.C. 2911.01(A)(1). Those two statutes provide respectively:

{¶ 39} "(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

{¶ 40} "(A) No person shall knowingly do either of the following:

{¶ 41} "(1) Cause serious physical harm to another or to another's unborn."

{¶ 42} In comparing the elements of these two offenses in the abstract without considering the evidence in this case, it is apparent that purposely causing the death of someone necessarily causes serious physical harm to that person. The offenses are so similar that the commission of one offense, purposeful murder in violation of R.C. 2903.02(A), necessarily results in commission of the other offense, felonious assault based upon causing serious physical harm in violation of R.C. 2903.11(A)(1). Accordingly, the two offenses are allied offenses of similar import, *Cabrales*, and we therefore must examine Defendant's conduct to determine whether these crimes were committed separately or with a separate animus as to each. *Rance; State v. Blankenship* (1988), 38 Ohio St.3d 116; R.C. 2941.25(B).

{¶ 43} The evidence in this case demonstrates that

Defendant committed two separate and distinct felonious assaults against D'Laquan Phillips, and then murdered him. The initial felonious assault occurred when Michael Phillips heard a gunshot and looked up to see his nephew, D'Laquan Phillips, struggling with Defendant. Although it is unclear from the record whether this first shot struck D'Laquan Phillips, this conduct corresponds to count four of the indictment which charged that Defendant caused or attempted to cause physical harm with a deadly weapon. This first felonious assault was completed before Defendant committed the second felonious assault, which occurred when Defendant shot D'Laquan Phillips in the back as Phillips attempted to flee. This shot struck Phillips and incapacitated him. The coroner testified that after being shot in the back, D'Laquan Phillips was paralyzed from the chest down. This conduct corresponds to count three which charged that Defendant caused serious physical harm. This second felonious assault was completed before Defendant stood over D'Laquan Phillips and shot him multiple times in the head, purposely causing his death.

{¶ 44} Under these circumstances, we conclude that the felonious assaults were committed separately from and prior to the purposeful murder, and therefore Defendant may be convicted and sentenced for all of those offenses.

{¶ 45} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 46} "THE DEFENDANT'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION, AS INCORPORATED TO THE STATES VIA THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WAS VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 47} This assignment of error, which has apparently been included in Defendant's brief at his insistence, raises the claim that Defendant's trial counsel performed deficiently because he failed to call defense witnesses who allegedly would have testified that the gunman who shot D'Laquan Phillips was wearing a mask. That testimony would contradict the eyewitness testimony of Michael Phillips that he looked the gunman dead in his face, which is why he was able to identify him.

{¶ 48} First, we note that our attention has not been directed to any place in this record where Defendant proffered the substance of what the defense witnesses, had they been called, would have testified to at trial. All we know in that regard is what Defendant himself "argues" in his appellate brief that the witnesses would have said if called to testify.

Absent a proffer, the substance of the witnesses' proposed testimony is a matter of sheer speculation, and in that event

the record does not demonstrate that defense counsel performed deficiently by failing to call those witnesses to testify at trial. Without a showing of deficient performance, ineffective assistance of counsel is not demonstrated. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 49} Additionally, we note that Defendant's appellate counsel states in his brief that "he has thoroughly reviewed the record and finds there is no merit to this Assignment of Error." Defendant's appellate counsel further states that he "finds this Assignment of Error to be wholly frivolous." Under these circumstances, there is no claimed error for this court to rule upon. This assignment of error appears to be nothing more than a pro se claim presented by Defendant. As is our policy, we decline to review pro se claims where, as here, Defendant is represented by counsel.

{¶ 50} Defendant's third assignment of error is overruled.

The judgment of the trial court will be affirmed.

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

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