

[Cite as *State v. Dority-Trapp*, 2009-Ohio-4058.]

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

STATE OF OHIO,	:	APPEAL NO. C-081114
	:	TRIAL NO. B-0800743
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
KELLY LAMONT DORITY-TRAPP,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

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

Date of Judgment Entry on Appeal: August 14, 2009

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

Timothy J. McKenna, for Defendant-Appellant.

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

SYLVIA S. HENDON, Presiding Judge.

{¶1} Following a jury trial, defendant-appellant Kelly Lamont Dority-Trapp was found guilty of attempted murder and murder, each with an accompanying firearm specification, and of two counts of having a weapon while under a disability. The weapon-under-a-disability counts were based on two separate dates and involved two different weapons. The trial court sentenced Dority-Trapp to 41 years to life. Presenting eight assignments of error, he now appeals. We affirm the jury's findings of guilt, but remand this case to the trial court for resentencing.

I. Dority-Trapp's Crimes

{¶2} Dority-Trapp admitted that he had shot Richard Whitaker and Marko Faulkner, but he claimed self-defense. Whitaker was severely injured. Faulkner died. Dority-Trapp testified at trial that Whitaker and Faulkner were among four men who, late on Halloween night, had pulled Dority-Trapp off of his bicycle and into an alleyway and had robbed him. According to Dority-Trapp, while he was being robbed, he heard the sound of a gun being cocked, so he pulled out his own gun, shut his eyes, and started firing.

{¶3} The state presented a different version of events. Surviving victim Whitaker testified that he and Faulkner had not robbed Dority-Trapp, but that another man, Cornelius Anthony, had. Following the robbery, Whitaker saw Dority-Trapp enter a store and come out minutes later with a gun. Dority-Trapp shot at Whitaker twice, hitting him once in the stomach. Dority-Trapp then chased after and shot Faulkner, firing at him four times. The state's theory was that Dority-Trapp had shot these men in retaliation for the robbery. Faulkner had been Anthony's cousin, and Whitaker was Anthony's friend. The state presented corroborating testimony and physical evidence that supported Whitaker's version of events.

{¶4} The state also tried Dority-Trapp on charges in connection with a robbery that had taken place days earlier and on a separate charge of having a weapon while under a disability. The jury acquitted Dority-Trapp of robbery, but found him guilty of having a weapon while under a disability, after Dority-Trapp had stipulated that he had been under a disability and had admitted that he had acquired a gun prior to the alleged robbery.

II. Weight and Sufficiency of the Evidence

{¶5} In his first and second assignments of error, Dority-Trapp contends that the jury's verdicts were against the weight and sufficiency of the evidence. They were not. Viewing the evidence in a light most favorable to the prosecution, it is beyond dispute that the state produced sufficient evidence to convince the jury beyond a reasonable doubt of Dority-Trapp's guilt.¹ And although Dority-Trapp had presented a version of events that, if believed, would have exonerated him of the shootings, the jury did not so lose its way in resolving the conflicts in the evidence presented as to warrant a new trial.² These assignments of error are overruled.

III. Dority-Trapp Was Not Entitled to a New Trial

{¶6} After the jury returned its verdict, Dority-Trapp moved the trial court for a new trial under Crim.R. 33(A)(1) and (5). His motion was denied. In his third assignment of error, Dority-Trapp contends that the trial court erred in overruling the motion because (1) he was prejudiced when the robbery charge was tried with the murder and attempted-murder charges, (2) he should have been permitted to play for

¹ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

² See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

the jury a taped statement he had made to police, and (3) the jury instructions were incorrect. We review the trial court's ruling for an abuse of discretion.³ We find none.

A. Joinder

{¶7} Dority-Trapp claims that he had been “unfairly prejudiced by evidence of the alleged robbery offense” because the state’s evidence pertaining to this charge suggested that he had carried a gun for reasons other than self-defense. But the jury acquitted Dority-Trapp of robbery, indicating that it had rejected any such suggestion by the state—if indeed there was one. And, overall, the state presented the evidence pertaining to the separate charges in a simple, direct, and chronological manner.⁴ This argument has no merit.

B. Dority-Trapp’s Statement

{¶8} Next, Dority-Trapp contends that he should have been granted a new trial because the trial court should have admitted into evidence the entire statement that he had made to police. Dority-Trapp claims that his statement should have been admitted under Evid.R. 106, 613, and 801.

{¶9} Dority-Trapp sought to introduce his statement during Cincinnati Police Officer Keith Witherell’s testimony. Officer Witherell had questioned Dority-Trapp in connection with the shootings. He testified that Dority-Trapp had given inconsistent accounts of the events leading up to the shootings, thereby casting some doubt on Dority-Trapp’s claim of self-defense.

{¶10} To the extent that Evid.R. 106 applied to this situation, we find that the trial court complied with it. That rule provides, in part, that “[w]hen a * * * recorded statement or part thereof is introduced by a party, an adverse party may require the

³ See *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶85; *State v. Mincy*, 1st Dist. No. C-060041, 2007-Ohio-1316.

⁴ See *State v. Robinson*, 1st Dist. Nos. C-070151 and C-070159, 2008-Ohio-2562; *State v. Harris*, 1st Dist. No. C-040483, 2005-Ohio-6995.

introduction at that time of any other part * * * which is otherwise admissible and which ought in fairness to be considered contemporaneously with it.”

{¶11} The trial court gave the defense wide latitude when cross-examining Officer Witherell, allowing defense counsel to rebut Officer Witherell’s damaging testimony by reading parts of Dority-Trapp’s statement. Defense counsel did not provide grounds for playing the entire three-hour statement to the jury. We find no error.

{¶12} And we find that Evid.R. 613 and 801 were inapplicable. Evid.R. 613 allows a witness to be impeached with his own prior inconsistent statement. It did not apply here because the statement that the defense sought to introduce against Officer Witherell was not Officer Witherell’s—it was Dority-Trapp’s.

{¶13} Evid.R. 801 also did not provide grounds for the introduction of Dority-Trapp’s entire statement. Dority-Trapp does not so specify, but we read his argument to be that his statement was admissible under Evid.R. 801(D)(1)(b) as a prior consistent statement. But, as we noted above, Dority-Trapp did not seek to introduce the statement during his own testimony. And since Dority-Trapp took the stand, he had a full opportunity to explain why he had given the police different stories.

{¶14} In sum, the trial court did not abuse its discretion when it failed to grant Dority-Trapp a new trial based on the court’s decision to exclude his entire taped statement from evidence.

C. Jury Instruction

{¶15} The trial court also did not abuse its discretion when it failed to grant a new trial based on alleged error in its jury instructions. Dority-Trapp claims that the following instruction was improper: “If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life or inflict great bodily harm, the purpose to cause the death may be inferred from the use of the weapon.” Dority-Trapp contends that the court should have instructed the jury that “the purpose to cause the death *may*

but need not be inferred from the use of the weapon.” But the use of the word “may” does not create a mandatory presumption, as suggested by Dority-Trapp. “May” is permissive.⁵ This argument has no merit.

{¶16} We overrule the third assignment of error.

IV. Ineffective Assistance of Counsel and Cumulative Error

{¶17} In his fourth assignment of error, Dority-Trapp contends that his counsel was ineffective for failing to call for a separation of witnesses at the beginning of trial.

{¶18} Defense counsel called for a separation of witnesses after Roy Smith, the state’s first witness, had testified. Smith claimed that Dority-Trapp had robbed him. He did not testify concerning the events surrounding the Halloween-night shootings. Dority-Trapp was acquitted of the robbery charge. So, he cannot demonstrate if or how he was prejudiced by his counsel’s delay in requesting a separation of witnesses.⁶ This assignment of error is overruled.

{¶19} In his fifth assignment of error, Dority Trapp contends that, even if a single alleged error set forth above did not deprive him of a fair trial, the accumulation of errors did. But since Dority-Trapp has failed to demonstrate any error at all, he cannot demonstrate cumulative error.⁷We overrule his fifth assignment of error.

V. Dority-Trapp’s Sentence

{¶20} Dority-Trapp’s sixth assignment alleges that the trial court erred when it sentenced him for both gun specifications and for both weapon-under-a-disability-charges. His gun-specification argument has merit.

⁵ See *State v. Getsy*, 84 Ohio St.3d 180, 196, 1998-Ohio-533, 702 N.E.2d 866; *State v. Levett*, 1st Dist. No. C-040537, 2006-Ohio-2222, ¶18.

⁶ See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, 538 N.E.2d 373.

⁷ See *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus.

{¶21} Under R.C. 2929.14(D)(1)(b), sentencing on two separate gun specifications is prohibited where the specifications arise out of the same act or transaction. In *State v. Russ*, this court held that the phrase “same act or transaction” means a series of continuous acts, bound together by time, space, and purpose, and directed toward a single objective.⁸ The court further wrote that “in assessing whether multiple firearm specifications are proper, a court should focus on an individual’s overall criminal objectives, not on the specific animus for each crime. Whether a defendant had a common purpose in committing multiple crimes is a broader concept than animus.”⁹

{¶22} In this case, the shootings were connected in time and space. The shots were fired in rapid succession. And under the state’s theory, the shootings were motivated by Dority-Trapp’s desire to seek revenge for being robbed. Under these facts, we hold that the gun specifications arose out of the “same act or transaction,” and that the trial court erred when it sentenced Dority-Trapp on both.

{¶23} Dority-Trapp cites no case law or statute in support of his argument that he should not have been sentenced on both weapon-under-a-disability charges. Nor do we find any legal basis for this assertion. Each count involved a different day and, under the state’s version of events, a different weapon. This argument has no merit.

{¶24} Dority-Trapp’s sixth assignment of error is sustained in part and overruled in part.

{¶25} In his seventh assignment of error, Dority-Trapp contends that he should have received minimum sentences. We find that his sentences were within the legal range, and that the trial court did not abuse its discretion. This assignment of error is

⁸ 1st Dist. No. C-050797, 2006-Ohio-6824, ¶25.

⁹ Id. at ¶26 (citations omitted); see, also, *State v. Anderson* (Feb. 6, 1998), 1st Dist. No. C-950608; *State v. Bonner* (Feb. 2, 1994), 1st Dist. No. C-930202.

therefore overruled on the basis of *State v. Foster*¹⁰ and *State v. Kalish*.¹¹

{¶26} In his eighth assignment of error, Dority-Trapp argues that his 41-year sentence violated his constitutional rights to due process and to be free from cruel and unusual punishment. But the trial court had before it evidence that Dority-Trapp had opened fire in a congested area and had shot two people killing one person and putting many other people at risk. The victims were not connected to the earlier robbery of Dority-Trapp, and the shootings were done out of his desire for revenge. In light of these facts, Dority-Trapp's sentences are not so disproportionate to the offenses that they "shock the sense of justice of the community."¹² This assignment of error is overruled.

{¶27} In sum, we affirm the jury's findings of guilt, but vacate the sentences imposed on the gun specifications and remand this case for resentencing on only one of the specifications.

Sentences vacated in part and cause remanded.

HILDEBRANDT and SUNDERMANN, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹⁰ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

¹¹ 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

¹² *State v. Weitbrecht*, 86 Ohio St.3d 368, 1999-Ohio-113, 715 N.E.2d 167.