[Cite as *State v. McClendon*, 2010-Ohio-4757.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23558
vs.	:	T.C. CASE NO. 09CR446
KYLE MCCLENDON	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . . . .

O P I N I O N

Rendered on the 1st day of October, 2010.

. . . . . .

Mathias H. Heck, Jr., Pros. Attorney; Laura M. Woodruff, Asst. Pros. Attorney, Atty. Reg. No.0084161. P.O. Box 972, Dayton, OH 45422
Attorneys for Plaintiff-Appellee

William O. Cass, Jr., Atty. Reg. No.0034517, 3946 Kettering Blvd., Suite 202, Kettering, OH 45439
Attorney for Defendant-Appellant

. . . . . .

GRADY, J.:

{¶ 1} Defendant, Kyle McClendon, appeals from his conviction and sentence for murder, felonious assault, and improper handling of a firearm in a motor vehicle.

{¶ 2} David Driscoll, a student at Sinclair Community College, and two of his friends from school, Kelly Altic and George DeLavergne, attended a party at an apartment in Harrison Township during the early morning hours of February 7, 2009. At 3:30 a.m., Driscoll and his two friends walked to the Marathon gas station and convenience store at 4351 Riverside Drive to buy cigarettes. As Driscoll and his friends approached the store, Defendant sped into the lot and parked his car at one of the gas pumps. DeLavergne and Altic were startled by the way Defendant pulled into the station because Defendant acted as though he might run over them.

{¶ 3} What transpired thereafter was captured on the store's surveillance cameras. The evidence presented by the State, including the surveillance video, demonstrates that as Driscoll and his friends stood at the checkout counter, Defendant entered the store, stopped and stared at them, and then walked to the back of the store. Moments later, Defendant came back up to the front of the store where he bumped into DeLavergne, saying, "Out of my way, homeboy." DeLavergne did not respond, and he and Altic went outside to wait for Driscoll, who remained waiting in line at the checkout counter.

{¶ 4} Defendant walked up to the counter, cutting in front of Driscoll. Driscoll told Defendant that he was next in line, and asked Defendant if he had any manners. Driscoll

nevertheless allowed Defendant to go ahead of him. While paying for his gas, Defendant pointed outside and told Driscoll they should take it outside. Driscoll was not physically aggressive toward Defendant inside the store and never threatened Defendant.

{¶ 5} On the surveillance video, Defendant exits the store, walks over to his car, and then starts to pump gas. Driscoll pays for his cigarettes, exits the store, and takes off his jacket and lays it on the pavement as he approaches Defendant. Defendant leaves the gas pump and the two men stand face-to-face near Defendant's car. Driscoll has his hands up in a fighting posture. By this time Defendant has pulled a gun, which he holds in his right hand and shows to Driscoll. Seconds later the two men appear to relax, they shake hands and embrace briefly. Driscoll walks back to get his jacket and Defendant walks back to his car. Suddenly, Driscoll turns and walks toward Defendant's car. Without hesitating, Defendant shoots Driscoll five times, gets into his car, and speeds away. Driscoll died at the scene from multiple gunshot wounds. His friends, DeLavergne and Altic, ran into a nearby woods and called 911.

{¶ 6} The store's surveillance video was clear enough that police could see the shooter and his car, which had distinctive wheels. The car was soon located in the parking lot of a nearby apartment complex. The owner of the vehicle, a young woman who

lived at the complex, gave police permission to enter her apartment. Police found Defendant inside the bedroom of the apartment. The murder weapon was partially concealed underneath a pillow next to Defendant.

{¶ 7} Montgomery County Sheriff's Detective John Clymer interviewed Defendant at the police station. Defendant admitted to Detective Clymer that he shot Driscoll, but stated that he didn't know why he shot him. Defendant said he did not see any weapon on Driscoll, and wasn't threatened by Driscoll or afraid of him.

{¶ 8} 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 - deadly weapon, R.C. 2903.11(A)(2), one count of felonious assault - serious physical harm, R.C. 2903.11(A)(1), and one count of improper handling of a firearm in a motor vehicle, R.C. 2923.16(B). All of the charges included a three year firearm specification, R.C. 2941.145.

{¶ 9} Defendant testified in his own defense at trial that he was drunk when he shot Driscoll. Defendant said that at no time did he see a weapon on Driscoll, but when Driscoll began walking back toward Defendant after the two men shook hands and embraced, appearing to end whatever conflict existed between them,

Driscoll had his hand in his coat, and Defendant feared Driscoll might be reaching for a weapon. Defendant then began firing his gun at Driscoll. Defendant testified that he hid the gun under a dresser in the apartment where police found him, and could not explain why police found the gun under a pillow next to Defendant.

{¶ 10} Defendant was found guilty following a jury trial of all charges and specifications. The trial court merged the two murder offenses, the two felonious assault offenses, and all five firearm specifications. Defendant was sentenced according to law to a combination of consecutive and concurrent prison terms totaling twenty-six years to life.

FIRST ASSIGNMENT OF ERROR

{¶ 11} "THE COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY ON SUDDEN PASSION OR SUDDEN FIT OF RAGE SO THAT THE LESSER INCLUDED OFFENSE COULD BE CONSIDERED."

{¶ 12} Defendant requested a jury instruction on the offenses of voluntary manslaughter and aggravated assault as lesser included offenses of the charged offenses of murder and felonious assault, respectively, arguing that the conduct of the victim, Driscoll, in repeatedly confronting Defendant, constituted serious provocation that was reasonably sufficient to arouse the passions of an ordinary person beyond the power of his control

and incited Defendant into using deadly force. The trial court denied Defendant's request.

{¶ 13} The decision whether to give a requested jury instruction is a matter left to the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. ***State v. Davis*****, Montgomery App. No. 21904, 2007-Ohio-6680, at ¶14.**

{¶ 14} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. ***Huffman v. Hair Surgeon, Inc.*** **(1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.**

{¶ 15} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue ***de novo,*** **would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result."** ***AAAA Enterprises, Inc. V. River Place Community Redevelopment*** **(1990), 50 Ohio St.3d 157, 161.**

{¶ 16} A trial court must fully and completely give all instructions relevant and necessary for the jury to weigh the

evidence and discharge its duty as the fact-finder. *State v. Comen* (1990), 50 Ohio St.3d, 206. If under any reasonable view of the evidence it is possible to find the defendant not guilty of a greater offense with which he is charged and guilty of a lesser offense, the instruction on the lesser offense must be given. *State v. Wengatz* (1984), 14 Ohio App.3d 316. Where the evidence in a criminal case would support a finding by the jury of guilty of a lesser offense included in the greater offense for which the Defendant was tried, it is prejudicial error for the trial court to refuse a defense request to instruct on the lesser offense. *State v. Parra* (1980), 61 Ohio St.2d 236.

{¶ 17} Voluntary manslaughter, R.C. 2903.03, is an offense of inferior degree to murder, R.C. 2903.02. Aggravated assault, R.C. 2903.12, is an offense of inferior degree to felonious assault, R.C. 2903.11. All of the elements of those inferior degree offenses are identical to or contained within the greater offense, with the exception of the mitigating element of serious provocation by the victim that is reasonably sufficient to incite Defendant into using deadly force in both voluntary manslaughter and aggravated assault. *State v. Shane* (1992), 63 Ohio St.3d 630; *State v. Henry*, Montgomery App. No. 22510, 2009-Ohio-2068.

{¶ 18} The test for whether the trial court should instruct the jury on voluntary manslaughter when the defendant is charged

with murder, and on aggravated assault when the Defendant is charged with felonious assault, is the same test applied when an instruction on a lesser included offense is sought. *Shane.* The instruction must be given when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder or felonious assault and a conviction for voluntary manslaughter or aggravated assault. *State v. Young*, Montgomery App. No. 19328, 2003-Ohio-1254.

{¶ 19} Defendant was charged with and found guilty of murder and felonious assault. He argues that the trial court should have granted his request to instruct the jury on the inferior offenses of voluntary manslaughter and aggravated assault. In analyzing whether instructions on voluntary manslaughter and aggravated assault were appropriate, the trial court must first determine whether, on an objective standard, the alleged provocation was reasonably sufficient to bring on a sudden fit of rage. *State v. Shane* (1992), 63 Ohio St.3d 630, 634. A voluntary manslaughter or aggravated assault instruction is appropriate only when the victim caused serious provocation. *Id.*

{¶ 20} Serious provocation is provocation that is "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Id.*, at 635. Additionally, serious

provocation has been described as provocation that is "reasonably sufficient to bring on extreme stress and * * * to incite or to arouse the defendant into using deadly force." *State v. Deem* (1988), 40 Ohio St.3d 205. Classic examples of serious provocation are assault and battery, mutual combat, illegal arrest and discovering a spouse in the act of adultery. *Shane, supra* at 635.

{¶ 21} If the objective standard is satisfied, the court must next determine, under a subjective standard, whether the defendant was actually "under the influence of sudden passion or in a sudden fit of rage." *Id.*, at 634. The "'emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time'" are only considered during this subjective stage of the analysis. *Id.*, quoting *Deem*.

{¶ 22} Defendant argues that he was entitled to jury instructions on voluntary manslaughter and aggravated assault based upon his testimony that as a result of Driscoll's repeatedly confronting him, Defendant became angry. Defendant testified that "he already done tested me twice," and that he was fearful of Driscoll.

{¶ 23} The trial court instructed the jury on self-defense, as Defendant requested, but refused to instruct on voluntary manslaughter and aggravated assault. The court found that even

viewing the evidence in a light most favorable to Defendant, there was insufficient subjective evidence that Defendant was actually acting under the influence of sudden passion or in a sudden fit of rage. Rather, Defendant shot Driscoll out of fear because he was afraid Driscoll might be retrieving a weapon out of his coat. Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or a sudden fit of rage. *State v. Mack*, 82 Ohio St.3d 198, 1998-Ohio-375, *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525; *State v. Maggard*, (June 4, 1999), Montgomery App. No. 17198.

{¶ 24} We agree with the trial court that the subjective prong of the serious provocation test has not been satisfied in this case, because the evidence Defendant offered, including his testimony at trial, demonstrates that Defendant acted out of his fear of possible harm at Driscoll's hands, which justified the instruction on self-defense, and not while under the influence of sudden passion or in a sudden fit of rage. *Young; Wilson*. We need not reach that issue, however, because the evidence presented further fails to demonstrate serious provocation by the victim that is reasonably sufficient to incite Defendant into using deadly force, and therefore fails to satisfy the objective prong of the serious provocation test.

{¶ 25} Applying an objective standard, the evidence fails to demonstrate that the victim's conduct constituted serious provocation; that is, provocation sufficient to arouse the passions of an ordinary person beyond the power of his control and incite that person into using deadly force. Defendant's version of the events, even if believed, fails to satisfy the objective prong of the serious provocation test.

{¶ 26} Defendant's evidence would have Driscoll trying to buy drugs from him, coming up behind him while inside the store, taking his coat off and challenging Defendant to a fight in the parking lot by putting his hands up in a fighting posture, and walking back toward Defendant after Defendant thought they had resolved whatever the problem was that prompted their face-off in the parking lot. This "provocation" by the victim, if any, consisted of nothing more than a threat which was relatively slight and in no way sufficient to constitute serious provocation that is reasonably sufficient to incite the use of deadly force, which is clearly excessive and out of all proportion to the relatively slight amount of provocation present here. *Henry*.

{¶ 27} Because the evidence fails to demonstrate the existence of serious provocation, an instruction on voluntary manslaughter or aggravated assault was not warranted by the evidence, and the trial court did not abuse its discretion in refusing to give those

instructions.

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

SECOND ASSIGNMENT OF ERROR

{¶ 29} "THE COURT ERRED WHEN IT DID NOT MERGE THE FELONY MURDER COUNT AND THE FELONIOUS ASSAULT COUNT."

{¶ 30} At the sentencing hearing, the trial court merged as allied offenses of similar import the two counts of murder, R.C. 2903.02(A) and (B), and sentenced Defendant only on the felony murder count, R.C. 2903.02(B). Likewise, the court merged the two counts of felonious assault, R.C. 2903.11(A)(1)and (2), and sentenced Defendant only on the felonious assault-deadly weapon count, R.C. 2903.11(A)(2). Defendant argues that the trial court erred by denying his request to also merge the allied offenses of felony murder, R.C. 2903.02(B), and felonious assault-deadly weapon, R.C. 2903.11(A)(2), pursuant to R.C. 2941.25. We agree, and accordingly sustain this assignment of error.

{¶ 31} We have previously considered this issue and concluded that felonious assault-deadly weapon, R.C. 2903.11(A)(2), and felony murder, R.C. 2903.02(B), are allied offenses of similar import under the two-tiered test set forth in *State v. Rance*, 85 Ohio St.3d, 632, 1999-Ohio-291, and clarified in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, and therefore those offenses must be merged for purposes of conviction and sentence,

unless they were committed separately or with a separate animus as to each. *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686; *State v. Scandrick*, Montgomery App. No. 23406, 2010-Ohio-2270; *State v. Alford*, Montgomery App. No. 23332, 2010-Ohio-2493. In examining those statutes we found that no legislative intent to permit multiple punishments was manifested. *Reid*, at ¶42. We decline the State's invitation to reconsider our decision in these recent cases.

{¶ 32} In *Reid and Scandrick* we specifically addressed whether, when they involve the same conduct, felonious assault in violation of R.C. 2903.11(A)(2) is an allied offense of felony murder in violation of R.C. 2903.02(B) because commission of one offense will necessarily result in commission of the other offense. *Cabrales*. In *Reid, we* stated:

{¶ 33} "{¶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.*"

{¶ 34} In this case there was but one criminal act/incident in which Defendant fired five shots at the same victim, David Driscoll, all at the same time in rapid succession. Defendant's animus in firing each shot was the same: to cause serious physical harm to Driscoll. All five shots struck Driscoll and he died as a result of multiple gunshot wounds. The offenses of felonious assault, R.C. 2903.11(A)(2), and felony murder, R.C. 2903.02(B), were not committed separately or with a separate animus for each, and accordingly their merger for purposes of R.C. 2941.25 is required. *Reid; Scandrick*.

{¶ 35} Defendant's second assignment of error is sustained. We will reverse and vacate Defendant's sentences for felony murder and felonious assault (deadly weapon), and the case will be remanded to the trial court to merge the felonious assault offense with the felony murder offense, and resentence Defendant accordingly. Otherwise, the judgment of the trial court is

affirmed.

BROGAN, J. And FAIN, J., concur.

Copies mailed to:

Laura M. Woodruff, Esq.
William O. Cass, Jr., Esq.
Hon. Dennis J. Langer