**[Cite as *State v. Platt*, 2012-Ohio-5240.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2011-08-146 |
| | : | O P I N I O N |
| - vs - | | 11/13/2012 |
| | : | |
| PHILLIP J. PLATT, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-08-1368

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**YOUNG, J.**

**{¶ 1}** Defendant-appellant, Phillip Platt, appeals his conviction in the Butler County Court of Common Pleas for felony murder and aggravated robbery.

**{¶ 2}** On August 8, 2010, appellant, Keri Kakaris (his girlfriend), and Ricardo Renfro (a.k.a. Ricco Renfro), agreed to rob Ransom "Randy" Manies at Kakaris' father's house. Kakaris knew Manies as she had worked for him on occasions. The plan was carried out the

following morning on August 9, 2010. Manies was lured to Kakaris' father's home with the promise of sex and/or Methadone. Prior to Manies' arrival, both appellant and Renfro hid in a closet; one was wearing a bandana, the other a ski mask. Shortly after Manies arrived, appellant and Renfro jumped out of the closet and attacked Manies. Manies fought back. During the struggle, Renfro applied a choke hold around Manies' neck. Appellant and Renfro took Manies' money and some of his property and fled the scene from a second-floor window. Manies was found dead later that day. Dr. James Swinehart, who performed an autopsy, testified that Manies died of cerebral hypoxia, that is, of a lack of oxygen to the brain.

**{¶ 3}** On September 29, 2010, appellant was indicted on one count of felony murder in violation of R.C. 2903.02(B), with the underlying first-degree felony of aggravated robbery, and one count of aggravated robbery in violation of R.C. 2911.01(A)(3). The trial court denied appellant's motion to suppress the statements he made to the police during his custodial interrogation. A jury trial was held on May 18-20, 2011. Appellant was found guilty as charged and sentenced to 15 years to life in prison.

**{¶ 4}** Appellant appeals, raising two assignments of error.

**{¶ 5}** Assignment of Error No. 1:

**{¶ 6}** THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO SUPPRESS THE DEFENDANT'S STATEMENT TO THE POLICE.

**{¶ 7}** Appellant argues that his statements to the police should have been suppressed because when the interrogating detective advised him of his *Miranda* rights, he failed to explicitly tell appellant that any statement he made could be used "against him." Appellant cites *United States v. Street*, 472 F.3d 1298 (11th Cir.2006); and *United States v. Tillman*, 963 F.2d 137 (6th Cir.1992), in support of his argument.

**{¶ 8}** Appellant's interrogation was videotaped. On the videotape, as he advises appellant of his *Miranda* rights, the detective can be heard saying, "This is the *Miranda* card and this says that I warn you I am a police officer. You have the right to remain silent and *anything you say can and will be used in a court of law*." At the suppression hearing, the state stipulated that the videotape did not include the words "against you." The detective testified that he did use the words "against you," however there was a glitch in the recording which caused the two words to be omitted from the videotape.

**{¶ 9}** Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8; *State v. Renfro*, 12th Dist. No. CA2011-07-142, 2012-Ohio-2848, ¶ 9. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *Burnside* at ¶ 8. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the trial court applied the appropriate legal standard. *Id.*

**{¶ 10}** It is well-established that a suspect who is subject to a custodial interrogation must be advised of his *Miranda* rights. *State v. Rader*, 12th Dist. No. CA2010-11-310, 2011-Ohio-5084, ¶ 8, citing *State v. Treesh*, 90 Ohio St.3d 460 (2001). The admissibility of any statements given by a suspect during custodial interrogation depends on whether the police warned the suspect that he has the right to remain silent, anything he says can be used against him in a court of law, he has the right to the presence of an attorney, and if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. *Treesh* at 470, citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

**{¶ 11}** "[T]here is no rigid rule requiring that the content of the *Miranda* warnings given

to an accused prior to police interrogations be a virtual incantation of the precise language contained in the *Miranda* opinion." *State v. Dailey*, 53 Ohio St.3d 88, 90 (1990). "[A] reviewing court need not examine the warnings as if construing a will or defining the terms of an easement." *Id.*, citing *Duckworth v. Eagan*, 492 U.S. 195, 109 S.Ct. 2875 (1989). Rather, the inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*. *Renfro*, 2012-Ohio-2848 at ¶ 10, citing *Florida v. Powell*, __U.S.__, 130 S.Ct. 1195 (2010).

**{¶ 12}** Upon reviewing the record, we hold that the warning provided to appellant was adequate under *Miranda*. We find the reasoning in *State v. Messino*, 378 N.J.Super. 559, 876 A.2d 818 (2005), to be persuasive. As in the case at bar, Messino argued that his statements to the police should have been suppressed because the *Miranda* warnings failed to explicitly inform him that any statement could be used "against him." While in police custody, Messino was given a *Miranda* warnings card and asked to read it aloud. The card stated in part, "Anything you say can and will be used in a court of law." The appellate court held that Messino's statements were admissible:

> We are convinced, however, that the warnings provided to defendant were sufficient to inform him of the substance of his constitutional rights. "[T]he words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation in order to be effective. Words which convey the substance of the warning alone with the required information are sufficient." In this matter, defendant was informed of the substance of his *Miranda* rights. Defendant was told that any statement he made could be used in a court of law. Defendant could have readily inferred that any statement given to the investigators could be used against him.

(Internal citations omitted.) *Messino* at 577.

**{¶ 13}** Appellant's reliance on *Street* and *Tillman* is misplaced. The warnings given to the defendant in *Street* completely omitted the advice that anything the defendant said could be used against him in a court of law. Likewise, the defendant in *Tillman* was not given any

warning about the use of his statements. By contrast, in the case at bar, appellant "was told that his statement could be used in a court of law, which in substance informed [him] that his statements could be used against him." *Messino* at 577.

**{¶ 14}** In addition, the detective testified, and the videotape shows that as he advised appellant of his *Miranda* rights, the detective had a *Miranda* warnings card in front of appellant and advised him to follow along. The detective then gave the card to appellant, told him to read it, and when he was done, to sign the back of the card. On the videotape, appellant appears to read the card. The detective testified that appellant appeared to read the card. Appellant then signed the card and inserted the date and time of the interview. The card clearly warns appellant that "anything you say can and will be used in a Court of law against you." *See State v. Moore*, 81 Ohio St.3d 22 (1998) (an accused's signed waiver form is strong proof that the waiver is valid).

**{¶ 15}** We therefore find that the trial court did not err in denying appellant's motion to suppress the statements he made to the detective during the first 28 minutes and 50 seconds of his custodial interrogation.[1] Appellant's first assignment of error is overruled.

**{¶ 16}** Assignment of Error No. 2:

**{¶ 17}** THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO PROVIDE A JURY INSTRUCTION REGARDING THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER.

**{¶ 18}** Appellant argues that the trial court erred by refusing to instruct the jury on the lesser included offense of involuntary manslaughter. Specifically, appellant asserts that the trial court should have instructed the jury on involuntary manslaughter as a lesser included

1. In its entry overruling in part and granting in part appellant's motion to suppress, the trial court stated, "Defendant's motion is overruled as to that portion of his statement[s] prior to his invocation of his Fifth Amendment rights at approximately 28 minutes, 50 seconds after the commencement of said statement[s]. Defendant's motion is granted as to that portion of his statement[s] made thereafter." The trial court's partial grant of appellant's motion to suppress is not an issue on appeal.

offense of felony murder because "while [appellant] certainly was present during the crime, the most that could be said was that he used or threatened the use of force against Manies, not that he inflicted serious physical harm on the victim."

**{¶ 19}** Appellant was charged with, and convicted of, felony murder in violation of R.C. 2903.02(B) and aggravated robbery in violation of R.C. 2911.01(A)(3). Pursuant to R.C. 2903.02(B), Ohio's felony murder statute, "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 [R.C.] 2903.03 or 2903.04." Both the indictment and the bill of particulars alleged that appellant caused Manies' death as a result of committing or attempting to commit a first-degree felony, to wit, aggravated robbery. At trial, at the state's request, the trial court instructed the jury that appellant could be found guilty of complicity to aggravated robbery.

**{¶ 20}** R.C. 2903.04(A), Ohio's involuntary manslaughter statute, prohibits a person from causing the death of another as a proximate result of committing or attempting to commit a felony. On appeal, appellant is essentially arguing that he was merely engaged in a robbery under R.C. 2911.02(A)(3), rather than in an aggravated robbery under R.C. 2911.01(A)(3), when Renfro, acting alone, choked Manies to death. A robbery under R.C. 2911.02(A)(3) only requires the use or threat of force against another and is a third-degree felony. By contrast, an aggravated robbery under R.C. 2911.01(A)(3) requires the infliction of (or the attempt to inflict) serious physical harm.

**{¶ 21}** A jury instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Wyatt*, 12th Dist. No. CA2010-07-171, 2011-Ohio-3427, ¶ 30. An instruction is not warranted, however, simply because the defendant offers "some evidence" to establish the lesser included offense. *Id.* Instead,

"there must be 'sufficient evidence' to 'allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense.'" (Emphasis sic.) *State v. Anderson*, 12th Dist. No. CA2005-06-156, 2006-Ohio-2714, ¶ 11, quoting *State v. Shane*, 63 Ohio St.3d 630, 632-633 (1992). In making this determination, the trial court must consider the evidence in a light most favorable to the defendant. *Wyatt* at ¶ 30. We review the trial court's decision refusing to give a requested jury instruction for an abuse of discretion. *State v. Gray*, 12th Dist. No. CA2010-03-064, 2011-Ohio-666, ¶ 23.

**{¶ 22}** Involuntary manslaughter is a lesser included offense of felony murder. *State v. Tucker*, 12th Dist. No. CA2010-10-263, 2012-Ohio-139, ¶ 32, citing *State v. Thomas*, 6th Dist. No. L-06-1331, 2009-Ohio-1748, citing *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284. Nonetheless, we find that no jury could have reasonably concluded that appellant's acts constituted anything other than aggravated robbery, the predicate offense supporting his felony murder charge.

**{¶ 23}** Testimony at trial clearly shows that appellant and Renfro conspired to rob Manies. The robbery was planned the day before. The following morning, both appellant and Renfro, hiding their identity by either wearing a bandana or a ski mask, hid in a closet. As soon as Manies walked past the closet, both appellant and Renfro jumped out of the closet, with appellant leading the way, and attacked Manies. According to Kakaris, appellant was yelling at Manies. A struggle ensued. Kakaris ran out of the house and waited in a getaway car. Five minutes later, both appellant and Renfro fled the house from a second-floor window and got into the car. As the car drove away, appellant and Renfro split up money, jewelry, and a cellphone they had stolen from Manies.

**{¶ 24}** With regard to the struggle which resulted in Manies' death, testimony at trial revealed the following. According to Kakaris, once in the car, appellant "said that when he went after [Manies] he was stronger than what he thought, and he put up a little bit of a

wrestle and he said that [Renfro] had to choke him out because * * * [Manies] was getting the best of [appellant]." After they fled the scene, appellant went to the apartment of Michael Byrd, an acquaintance. According to Byrd, appellant told him "he [appellant] got into a fight [and he thought] the dude might have died."

**{¶ 25}** The videotape of appellant's interrogation was played to the jury. During the interrogation, appellant stated that (1) it was supposed to be a simple robbery; however, Manies was "in a rage" and fought back, "and from there it was a struggle;" (2) As Manies fought back, "he threw me off, * * * right to the side, * * * and him and [Renfro] went at it;" and (3) "I'm not the guilty one, but I'm a guilty party in a situation." Appellant also stated that after he was the first one getting out of the closet, Manies swung at him but missed him. Manies also grabbed him but appellant was able to get away. Subsequently, Manies and Renfro struggled until Renfro applied a choke hold around Manies' neck.

**{¶ 26}** Appellant witnessed Renfro apply a choke hold around Manies' neck. Appellant testified that as Renfro was choking Manies, the latter was turning blue and purple and kept saying either "you're going to kill me, you're going to kill me," or "you're killing me, you're killing me." Appellant did not stop Renfro from choking Manies and instead went upstairs looking for Kakaris. After he realized she was not there, he went back downstairs and urged Renfro to leave, saying, "come on man, quit playing, come on, Ricco, let's go. * * * So [Renfro] left the dude alone" and he and appellant fled the house.

**{¶ 27}** As stated earlier, Dr. Swinehart testified that Manies died of cerebral hypoxia, that is, of a lack of oxygen to the brain. Manies had "deep neck injuries" with significant hemorrhage to his larynx and his left sternocleidomastoid muscle (a large neck muscle). Dr. Swinehart also testified that one can lose consciousness in 15 to 20 seconds, however, "if the pressure is removed, very often the individual will be revived."

**{¶ 28}** The evidence shows that appellant and Renfro acted in concert and that each

engaged in the offense of aggravated robbery. Renfro intended to cause serious physical harm to Manies when he applied a choke hold around Manies' neck. Because appellant saw Renfro choking Manies and did not intervene, thus tacitly approving the use of the choke hold, it can be inferred that appellant, as an accomplice, intended to cause serious physical harm to Manies. *See State v. Brodie*, 2d Dist. No. 20877, 2006-Ohio-37 (jury instruction for involuntary manslaughter as a lesser included offense of felony murder properly rejected where by tacitly approving the use of a weapon by another, defendant intended, as an accomplice, to cause serious physical harm to the victim).

**{¶ 29}** Because the evidence did not reasonably support an acquittal on appellant's felony murder charge and a conviction on the lesser included offense of involuntary manslaughter, the trial court did not err in refusing to instruct the jury as such. Appellant's second assignment of error is overruled.

**{¶ 30}** Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.