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

STATE OF OHIO,	:	APPEAL NO. C-150387 TRIAL NO. B-1300802-B
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
LAVON ODEN,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Lavon Oden appeals from the judgment of the Hamilton County Court of Common Pleas convicting him, after a jury trial, of one count of murder, in violation of R.C. 2903.02(B), with a firearm specification, three counts of aggravated robbery, in violation of R.C. 2911.01(A)(1), each with a firearm specification, and one count of having weapons under a disability, in violation of R.C. 2923.13(A)(3). Oden was acquitted on one count of aggravated murder. The court imposed consecutive terms, for an aggregate sentence of 63 years to life in the department of corrections.

The evidence at trial demonstrated that Oden shot and killed Da'Shawn Wheeler after robbing Wheeler, Robert Johnson, and Darryl Craig, all occupants of a car that Johnson had driven to Burton Avenue in Cincinnati to sell marijuana. At the time of the shooting, Oden was under a disability that prohibited him from having a firearm.

Johnson and Curtis Boston had set up the sale of Craig's drugs to Oden with text messages, although Johnson was not informed of Oden's name. When Boston brought

Oden to the car, Oden took the drugs from Craig and then pulled out a gun and demanded and received money from the car's occupants. When Oden demanded Johnson's earrings, Johnson sped away. Oden, who goes by "Whiteshit," fired a shot through the open back window. The bullet traversed the front passenger seat where Wheeler was sitting and caused his eventual death about five minutes later at the nearby hospital where Johnson, accompanied by Craig, had driven him.

Boston was charged as a codefendant but testified against Oden as part of a plea agreement. He testified, consistent with a text message that he sent shortly after the shooting, that "Whiteshit" had robbed the occupants of the car during the drug deal and had fired the shot that killed Wheeler. Boston additionally testified that Oden had used a Ruger pistol, which was included among the 30 brands of firearms that could have fired the bullet based on the ballistic testing. Johnson testified, consistent with his pretrial identification of Oden in a photographic lineup, that Oden was the robber and shooter. Craig apparently refused to testify, but the contents of his cellular phone text records and his pretrial identification of Oden were admitted into evidence without objection.

The cellular phone locator records for the phone numbers associated with Oden and Boston demonstrated that both phones had been exclusively pinging off of the same Cincinnati Bell cellular tower and sector for the relevant time period before and after the shooting. That tower and sector were closest to the shooting, which demonstrated that, consistent with Boston's testimony, Boston and Oden had been together and in the vicinity of that tower around the time of the shooting. Further, Oden's text messages indicated that he was trying to sell a Ruger firearm less than a day after the shooting.

In his defense, Oden presented testimony from two experts, one generally challenging the use of "cell tower forensics," and the other challenging the use of eyewitness identification testimony. Oden now appeals, raising six assignments of error.

We overrule the first assignment of error, claiming that the court permitted the state to exclude a prospective juror because of his race, in violation of *Batson v. Kentucky*,

476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), because we cannot say on this record that the trial court's finding of no discriminatory intent was clearly erroneous. *See State v. Phelps*, 1st Dist. Hamilton No. C-100096, 2011-Ohio-3144, ¶ 17, citing *State v. Hernandez*, 63 Ohio St.3d 577, 583, 589 N.E.2d 1310 (1992).

In his second assignment of error, Oden argues that plain error occurred at trial when the trial court admitted hearsay evidence, including Craig's out-of-court identification of Oden as the shooter and the content of Craig's text messages. Although much of this evidence was inadmissible hearsay, we cannot say, in light of the significant, admissible evidence of guilt, that the results of the trial would have been different absent its admission, and that a reversal is necessary to avoid a manifest injustice. *See State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraphs two and three of the syllabus. Thus, we overrule the second assignment of error.

We overrule the third assignment of error, which challenges the trial court's denial of a mistrial that was requested due to Boston's alleged violation of the separation order in the case, because the appellant demonstrated neither that Boston had discussed what had been testified to in court in violation of the order nor that a fair trial was not possible. *See* Evid.R. 615; *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

In his fourth assignment of error, Oden argues that he was denied the effective assistance of counsel due to counsel's failure to object to the admission of hearsay evidence and to renew the motion for a mistrial at the conclusion of the trial. But the record fails to disclose a reasonable probability that, but for the alleged omissions of trial counsel, the results of Oden's trial would have been different. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

We overrule Oden's fifth assignment of error, which alleges that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. First, upon the evidence adduced at trial, reasonable minds could have reached

different conclusions as to whether each element of the offenses as charged in the indictment had been proven beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). And, second, we find nothing in the record of the proceedings below to suggest that the jury, in resolving the conflicts in the evidence adduced on the charged offenses, lost its way or created such a manifest miscarriage of justice as to warrant the reversal of the convictions. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We note that the weight to be given the evidence and the credibility of the witnesses were primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

Oden's final assignment of error involves his sentence. He first argues that the trial court erred by not merging the murder and aggravated-robbery counts. Oden was convicted of felony murder for causing the death of Wheeler during the commission of an aggravated robbery. He was also convicted of three counts of aggravated robbery in violation of R.C. 2911.01(A)(1), which provides that "[n]o person, in attempting or committing a theft offense * * * shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it." Here, Oden fired the fatal bullet into the passenger seat of the car as the driver sped away from the robbery. This gratuitous violence demonstrated an intent to seriously harm and intimidate separate from the animus involved in the aggravated robberies. *See State v. Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 87; *compare State v. Curtis*, 1st Dist. Hamilton No. C-150174, 2016-Ohio-1318 (finding no separate animus when victim shot to obtain his property during an aggravated robbery). Thus, merger was unwarranted. *See* R.C. 2941.25(B); *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892.

Oden also argues that the sentence was erroneous because the trial court failed to consider the purposes and principles of sentencing, did not make the findings required by

R.C. 2929.14(C)(4) to impose consecutive terms, and imposed consecutive sentences on all four gun specifications, even though it was only required to impose consecutive sentences on just two of the most serious offenses. But the appellant has not demonstrated that the court failed to consider the purposes and principles of sentencing, and we need not even presume such consideration, even though we may, *see State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-110829, 2012-Ohio-3349 ¶ 24, because the court expressly announced that it had. Moreover, the court made the R.C. 2929.14(C)(4) findings at the hearing and included them in the judgment of conviction, and imposed consecutive sentences on the gun specifications in accordance with the relevant statute. Thus these alleged errors are not demonstrated in the record.

And we find no merit to Oden's argument the trial court erred by failing to inform him whether he may or may not be eligible for earned days of credit, because R.C. 2967.193(A) does not require such a notification. *See State v. Temaj-Felix*, 1st Dist. Hamilton No. C-140052, 2015-Ohio-3966, ¶ 13. Ultimately we cannot clearly and convincingly say that the record does not support the trial court's sentencing findings or that the sentence is otherwise contrary to law. *See State v. White* 2013-Ohio-4225, 997 N.E.2d 629 (1st Dist.), citing R.C. 2953.08(G)(2). Accordingly, we overrule the sixth assignment of error.

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DEWINE and **MOCK, JJ.**

To the clerk:

Enter upon the journal of the court on September 23, 2016

per order of the court _____.

Presiding Judge